

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

75-7016
75-7041

United States Court of Appeals

For the Second Circuit.

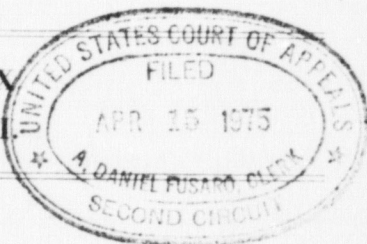
ROBERT ELLIOTT and SHIRLEY ELLIOTT,
Plaintiffs-Appellees,

against

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING CO., Inc.,
MAGGIOLO FOUNDATION CORP., G & A CONTRACTING
CORP. and RONNIE GORR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

Appella's APPENDIX
Volume II



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PAGINATION AS IN ORIGINAL COPY

Index to Appendix.

Page

TESTIMONY.

WITNESSES FOR PLAINTIFFS:

Bernstein, Charles:	
Direct	352a
Bessen, Dr. Seymour:	
Direct	282a
Cross	288a
Cosentino, Dr. Salvatore:	
Direct	245a
Re-direct	246a
Elliott, Robert W.:	
Direct	247a
Gaynin, Dr. Henry T.:	
Direct	267a
Cross	269a
Peimer, Ralph:	
Direct	261a
Cross	265a
Schacht, Joe:	
Direct	256a
Cross	260a
Utegg, David:	
E.B.T.	211a

WITNESSES FOR DEFENDANT MAGGIOLO:

	Page
Diacono, Joseph:	
Direct	307a
Cross	310a
Re-direct	326a
DuBois, Brian:	
Direct	331a
Cross	336a
MacDowell, Alan:	
Direct	327a
Cross	327a
Newmark, Irvin:	
Direct	290a
Cross	294a
Re-cross	298a
Cross (continued)	301a
Re-direct	303a
Utegg, Harold:	
Direct	348a
Cross	350a

Excerpts From Transcript.

David Utegg, E.B.T.

(83) Mr. Edelman: (Reading)

"Question: Mr. Utegg, are you married?

Answer: Yes.

"Question: What is your wife's name?

"Answer: Margaret.

"Question: Have you any children?

"Answer: Yes. Two, two boys.

"Question: Where do you live?

"Answer: Road 1, Halley, Pennsylvania.

"Question: How long have you lived there?

"Answer: Two years.

"Question: On April 24th, 1972, were you employed by the Maggiolo Corporation?

"Answer: Yes, sir.

"Question: In what capacity were you employed?

"Answer: Truck driver.

"Question: How long had you been employed by the Maggiolo Corporation prior thereto, before that?

"Answer: Oh, we worked on a couple of different jobs.

"Question: Over what period of time?"

And then Mr. Sergi said, "I move to strike the answer as not responsive to the question. The question is how long had you worked for Maggiolo.

"Answer: On this job?

(84) "Mr. Sergi: Whenever? Isn't that your question?

"Mr. Evelyn: Yes.

"Answer: I worked there for nearly a month or so.

"Question: And what job were you working on on April 24, 1972?

David Utlegg, E.B.T.

"Answer: I was working there around the fishing market there. I don't remember the street.

"Question: Is that Woodridge, New York?

"Answer: Right.

"Question: Was there a demolition job whereby they were demolishing some buildings on behalf of the Urban Renewal Corporation, do you know?

"Answer: Yes. That was what I was doing.

"Question: Sometime that day were you advised that an accident had occurred on Glenwild Road as a result of which a person who you later found out to be Robert Elliott who was injured?

"Answer: Nobody contacted me personally, but Harold and Brian contacted me, told me.

"Question: On April 24, 1972, what sort of a truck were you driving?

"Answer: Ford ten-wheeler.

(85) "Question: What was the color of the cab and what was the color of the body?

"Answer: Red, the whole truck is red.

"Question: Do you remember whether or not you had a lettering on this truck at all?

"Answer: No, no markings on my truck.

"Question: Do you remember what year the truck was?

"Answer: It could be '67, '66—or '67, I don't remember.

"Question: Was the truck in fairly good condition?

"Answer: A-1 shape.

"Question: What sort of truck was it, was it a dump truck?

"Answer: For ten-wheeler dump truck.

"Question: Prior to, before you heard this, some statement to the effect that Bob Elliott was injured, did you see a truck that was owned or used by the Town of Woodridge, a dump truck?

"Answer: Yes.

David Utteg, E.B.?

"Question: Where did you see that?"

"Answer: Behind the fish market at the gravel where we were picking gravel up.

(86) "Mr. Sergi: You are going too fast, I can't hear you.

"Answer: Around the corner.

"Question: At that time what was the color of that truck, do you remember?"

"Answer: It was a yellow—tan, I'd say. Tan.

"Question: Did it have any markings on it?"

"Answer: On the door.

"Question: At any time that morning, did you see that truck on Glenwild Road?"

"Answer: Well, we were working around there. It's a town truck.

"Question: As far as the work you were doing, did you take the debris from the demolition job and take it somewhere?"

Mr. Sergi: Objection, your Honor.

Mr. Edelman: I'm sorry, that was an objection.

The Court: May I have the question again?

Mr. Edelman: No, there is no answer, your Honor, so I'm sorry.

The Court: No answer at all?

Mr. Edelman: No.

The Court: Disregard the question then.

Mr. Edelman: (Continuing)

(87) "Question: Did you take the debris from this demolition job to a dump?"

"Answer: Yes."

Mr. Sergi: Objection, your Honor, he never testified before this particular question that he was carrying debris at any time to any place. There

David Utegg, E.B.T.

is an assumption in that question, and it's improper.

The Court: Overruled. I will allow it.

Mr. Edelman: May I read the question again, your Honor?

The Court: Yes.

Mr. Edelman:

"Question: Did you take the debris from this demolition to a dump?

"Answer: Yes.

"Question: Where did you take the debris from?

"Answer: Well, from four or five different buildings, we hauled from.

"Question: Where was that in relation to the town, if you remember?

"Answer: Well, this was just around the midsquare there.

"Question: What town was that?

"Answer: Woodridge.

(88) "Question: Where would you take these loads?

"Answer: I took—took them all to be dumped.

"Question: Where was the dump?

"Answer: About three miles up the road from there.

"Question: When you took it from the town to the dump, did you travel along the Glenwild, Woodridge Road?

"Answer: Yes.

"Question: That morning when you were travelling along the Glenwild, Woodridge Road did you see this town truck, the Woodridge town truck?"

Mr. Sergi: Objection, there was no testimony that he was travelling in that truck on that morning on that day.

The Court: Overruled. I will allow it.

Mr. Edelman:

David Utegg, E.B.T.

"Answer: You mean—

"Question: Did you see it somewhere on Glenwild Road?

"Answer: Yes. We saw it up in there.

"Question: At that time, about what time of the day was it when you saw the truck there, in the morning?

(89) "Answer: Well, we saw it off and on at different times during the day.

"Question: I'm talking about Glenwild Road, the Road that leads from the town to the dump.

"Answer: Between break and lunchtime.

"Question: All right. And in any event, would that be somewhere around 11:30, to the best of your memory, a.m.?"

Mr. Sergi: Objection as leading and suggesting 11:30 a.m. when the witness never said 11:30 at all.

The Court: Overruled.

I will allow it. You may answer.

Mr. Edelman:

"Answer: I say somewhere around there sometime.

"Question: At that time when you saw this truck, did you see any individual at all on the highway near the curb in the direction you were going, did you see—"

Mr. Sergi: Objection as to form. Leading.

The Court: Overruled.

Mr. Edelman: May I reread the question because I haven't completed it.

The Court: Yes.

Mr. Edelman:

"Question: At that time when you (90) saw this truck did you see any individual at all on the highway near the curb, in the direction you were going, did you see a person?

David Utlegg, E.B.T.

"Answer: One time there was a fellow standing by a grate there."

Mr. Sergi: Objection. Move to strike the answer as not responsive. The question was: At that time . . . and the answer is, "one time . . ."

The Court: Overruled. I will allow it.

Mr. Edelman:

"Question: All right, could you give us some general description of this individual?"

"Answer: Oh, about five-nine, five-ten, around there, 200.

"Question: And do you know how old or young he was?"

"Answer: Oh, I'd say he was in his late thirties, in his thirties.

"Question: Had you seen this man before?"

"Answer: Different times on the truck, yes.

"Question: On which truck did you see him?"

"Answer: On the town truck.

"Question: At this time where were you going when you saw him on the right side near this basin (91) or drainage where you were going to?"

"Answer: Only place we went was up to the dump.

"Question: At that time, what were you hauling, what did you have on your truck?"

"Answer: Everything from the building, wood, lumber, iron, concrete, everything and all.

"Question: And who would load this truck?"

"Answer: Maggiolo front-end loaders."

There is another part of the answer, sir.

"Answer: Maggiolo front-end loaders. There was a 988 and there was another motor there, one loader—one loaded at different times.

"Question: When you saw him, was he on your right or on your left, when you saw him near the curb?"

David Utegg, E.B.T.

Mr. Sergi: There is an objection, your Honor.

Mr. Edelman: There is no objection to this.

The Court: On what ground?

Mr. Sergi: The question is: "Now, when you saw this man on the right side of the road—?"

He said left side of the road. I object to the reading as improper. Following the question I made an objection to the form of the question.

The Court: Overruled. I will allow it.

(92) Mr. Edelman: Your Honor, may I read the question?

The Court: Yes.

Mr. Edelman: I am not reading the question that he's objecting to, I am reading the next question where there is no objection.

"Question: When you saw him was he on your left or on your right when you saw him near the curb?

"Answer: On the right, I guess.

"Question: Okay.

"When you saw him there where was this town truck in relation to where he was, was it on the right side of the road or on the left side of the road, if you remember?

"Answer: I think it was on the other side of the road.

"Question: Was he at that time approximately across the way from where his truck was parked, approximately?

"Answer: Around. About.

"Question: For how long during that day had you made other trips to this dump?

"Answer: That's all we did mostly is run to the dump or run up to the laundromat.

(93) "Question: Incidentally, were you ever told at any time before that time that some material or debris would fall off the truck before this time?"

Mr. Sergi: Objection, leading.

David Utegg, E.B.T.

The Court: Overruled on the grounds stated.
You may answer.
Mr. Edelman:

"Answer: They used to have a fellow follow us with a pickup truck.

"Question: Who is he?

"Alvin. I don't know his last name.

"Question: Can you give us some description of him?

"Answer: He was a colored fellow; big, tall fellow.

"Question: About how old?

"Answer: Oh, ~~boy~~—

"Question: Roughly.

"Answer: I'm not much on ages. Those guys who are younger looking—those guys who are younger look older to me. No offense to them. I say he was in his forties.

"Question: Was it his job to pick up the debris that would fall off the truck?

"Answer: Yes. That's what Alvin used to do.

(94) "Question: When you saw this man that you described approximately in the thirties, about five-nine, weight, 200 pounds on the right side at this time, do you remember whether or not he had any tools in his hands?"

Mr. Sergi: Objection, leading.

The Court: Overruled.

Mr. Edelman:

"Answer: I think he had a rake or something. I don't—a rake or something.

"Question: Do you remember whether or not when your truck passed this gentleman or this man, was there any part of the debris that was on your truck that fell off your truck?

"Answer: No, I don't know if anything fell off, but you don't—

David Utegg, E.B.T.

"Question: On this job on that day, were there other trucks that were being used by Maggiolo?"

"Answer: Yes, three others of Ronnie's trucks.

"Question: Were there any other Maggiolo trucks, was the question?"

"Answer: No, Maggiolo. Rosey and I used to drive on other days.

"Question: All these trucks that were used (95) by Maggiolo to do this demolition on that day, were they all Ronnie's trucks?"

"Answer: Yes.

"Question: Could you give us a description of the other trucks besides the one you were driving?"

"Answer: Ronine's truck is all in A-1 shape. He had all red trucks then.

"Question: What makes are they, if you remember?"

"Answer: All Fords.

"Question: Were they all about—that was—what was the size of these trucks?"

"Answer: All ten-wheelers.

"Question: What is that called, a ten-wheeler tandem?"

"Answer: Right.

"Question: Were they all dump trucks?"

"Answer: All dump trucks.

"Question: Did they do the same work you did?"

"Answer: Right.

"Question: The other drivers of these trucks, were they also employed by Maggiolo?"

"Answer: Right.

"Question: By the way, had you operated any of the Gorr trucks on this Maggiolo job at any time (96) before this day?"

"Answer: Yes.

"Question: By whom were you paid for this day's work?"

"Answer: Maggiolo Corporation.

David Utegg, E.B.T.

"Question: Who controlled what you should do that day on this job?

"Answer: Joe was the foreman from Maggiolo.

"Question: Did he tell you what to do?

"Answer: Yes. He told us where to haul it. That's all we did.

"Question: As far as the loading of these trucks, was that done by any of the Gorr people or only Maggiolo people?

"Answer: No. Just Maggiolo.

"Question: As far as you know, the only relationship to this job, as far as Gorr was concerned, was the fact that it was his trucks; is that right?

"Answer: That's right.

"Question: Mr. Utegg, I see that you are wearing glasses now. Have you some difficulty with your eyes now?

"Answer: Yes. I lost my vision a year ago Saturday, this Saturday.

(97) "Question: However, at the time of the happening of this occurrence, did you have on April 24th, 1972, did you have any trouble with your vision at all?"

That's with your eyes at all.

"Question: With your eyes at all?

"Answer: No, I had good eyesight then."

"Examination by Mr. Sergi:

"Question: Can you tell us under what conditions you lost the vision of your eyes?

"Answer: Broken blood vessels in the back of my eyes.

"Question: Broken blood vessels?

"Answer: Right.

"Question: Mr. Utegg, you have arrived here pursuant to a subpoena served upon you by the plaintiff; is that correct?

David Utegg, E.B.T.

"Answer: Right. Right, by the plaintiff.

"Question: You got a subpoena?

"Answer: Right.

(98) "Question: How did you get down here from Europe?

"Answer: Mr. McGuire.

"Question: Who is Mr. McGuire?

"Answer: He is one of the fellows in Mr. Orsec's office.

"Question: Who is Mr. Orsec?

"Answer: He is a lawyer from Liberty.

"Question: Whose lawyer is he, do you know?

"Answer: No, I don't. He's not my attorney.

"Question: Do you know if he's the Plaintiff, Mr. Elliott's attorney?

"Answer: Yes, I do know that.

"Question: You have been to Mr. Orsec's office, have you not?

"Answer: Yes.

"Question: More than once?

"Answer: No.

"Question: Just once?

"Answer: Just once.

"Question: Isn't it also a fact that Mr. Orsec also represents you in the claim?

"Answer: No, he's not my lawyer.

"Question: He's not your lawyer, he never represented you; is that right?

"Answer: No.

(99) "Question: You said you have been to his office only once. When was that time?

"Answer: A week ago.

"Question: A week ago?

"Answer: Right.

"Question: Prior to that, did Mr. Orsec or anyone from his office, or from Mr. Redman's office, speak to you regarding this accident?

David Ulegg, E.B.T.

"Answer: I was called a couple—twice, but nothing. They asked me if I worked on this job, and stuff, and that's all.

"Question: All right. When was the first time you were contacted and asked about this particular accident?

"Answer: About two weeks ago.

"Question: That was the very first time?

"Answer: Right.

"Question: That was the first time that anyone spoke to you?

"Answer: A year ago I was called once.

"Question: By whom?

"Answer: Mrs. Gorr.

"Question: Mrs. Gorr—Did you speak to Mrs. Gorr about the accident?

"Answer: She asked me if I knew I hit somebody. (100) I said I don't remember hitting anybody.

"Question: Hitting somebody with the truck, or with the trucks?

"Answer: She said if I remember hitting anybody. I said if I had, no.—If I hit somebody, I would have stopped, if I knew I hit somebody, I wouldn't go on, I wouldn't keep on going.

"Question: At this time, the date the accident was supposed to occur, which was the time you were driving a truck for Maggiolo, did the Police ask you any questions, if you knew anything about the accident occurring to Mr. Elliott?

"Answer: No.

"Question: Did Mr. Maggiolo's Foreman ask you any questions, whether you knew anything about the claim that Mr. Elliott was injured?

"Answer: No.

"Question: During the period of time that you had your luncheon break between the hours of 12:00 and 1:00—

"Answer: 12:00, 12:30.

David Utegg, E.B.T.

"Question: 12:00 and 12:30?

"Answer: We always had one-half hour lunch.

"Question: During that time, between 12:00 and 12:30, would you be operating your truck at that time?

"Answer: No.

(101) "Question: You have your lunch at the time—"

Mr. Edelman: May I re-read it, your Honor?

The Court: Yes.

Mr. Edelman:

"Question: You have your lunch at the time, place, approximately during that half hour?

"Answer: Yes, sometimes we stopped a few minutes, too.

"Question: Where would you have your lunch?

"Answer: Sometimes we ate at the dump, sometimes we ate downtown, depending on where we were.

"Question: Would you give us the names of the other drivers?

"Answer: My brother Harold Utég, Brian DuBois, Milo Conklin.

"Question: At any time had you discussed with the drivers you just mentioned—

"Answer: No.

"Question: May I finish, please—this accident?

"Answer: No.

"Question: Did you ever talk to Mr. Elliott about this accident?

"Answer: No, I never met him person-to-person.

"Question: I assume this is the gentleman, the gentleman with the yellow shirt. Are you Mr. Elliott?

"Whereby, the Plaintiff, Robert Elliott, nodded.

(102) "Have you ever seen Mr. Elliott?

"Answer: The one with the yellow shirt?

"Question: Yes. I know you are having a problem seeing.

David Utegg, E.B.T.

"Answer: I can only see better with my left eye.

"Question: Is this the first time you have seen Mr.—"

Mr. Edelman: There is no answer.

"Question: Did you ever know Mr. Elliott before this alleged accident on April 24?"

"Answer: No.

"Question: When for the first time did you meet Mr. Elliott before today?"

"Answer: I never did. I never was introduced to him yet.

"Question: Can you see him well enough now to tell us whether this is the man you say you saw . . ."

I skipped something, Your Honor.

"Question: Can you see him well enough now to try to tell us whether this is the man you say you saw on the road the day that you say you saw a man standing working at a catch basin?"

"Answer: I can see he's about the size of him. I cannot tell by his face.

"Question: You cannot tell by his face?"

(103) "Answer: No.

"Question: On the day of this accident, do you recall whether you were carrying sand to various places from the demolition site?"

"Answer: Different times when we got done hauling the buildings away, we used to cover up the bottom with sand, gravel.

"Question: That's not what I asked you, sir. I ask you again on the day that this accident was supposed to have occurred, you say that you were carrying debris to a dump?"

"Answer: Right.

"Question: Were you also carrying sand away from the demolition site on that day?"

"Answer: Yes.

David Utteg, E.B.T.

"Question: Is that right?

"Answer: Yes.

"Q. Question: When you carried sand on that day, would you take it down the same road where the dump was, or would you take it somewhere else?

"Answer: We never hauled sand up to the dump.

"Question: You would take it somewhere else?

"Answer: Right.

"Question: Can you recall, sir, whether, on the morning of April 24, 1972, whether you were carrying some (104) debris, or whether you were carrying some sand to the other place?

"Answer: Some days we'd haul both.

"Question: I didn't ask ~~you~~ that, sir. I am asking you specifically about April 24, 1972. That's the day this accident was supposed to occur, and that you were driving down this road, and you observed the truck and a man in the road; is that correct?

"On that day, sir, I am calling on your recollection.

"Answer: Right.

"Question: Do you know whether or not, whether on this morning you drove sand to the other place, or whether you were driving debris down to the dump?"

Mr. Edelman: Then the answer is on the next page, line 13.

"Answer: If I just hauled sand that day, I don't know.

"Question: Do you remember if you just hauled debris that day?

"Answer: No.

"Question: You don't remember that, either. Like I said a few moments ago * * *

Mr. Edelman: This is an answer, I'm sorry.

"Question: You don't remember that, either?

(105) "Answer: Like I said a few minutes ago, we'd

David Utegg, E.B.T.

haul everything. We haul sand, gravel, whatever you want to call it.

"Question: You did that for about a month while you were in the employ of Maggiolo, is that correct?

"Answer: Yes.

"Question: And every day was the same?

"Answer: Yes, that's all we did.

"Question: So April 24 was no different than April 23 or April 21 or April 20, is that correct?

"Answer: Right.

"Question: When you say you were driving along the road on the way to the dump, and you observed this fellow * * *

Mr. Edelman: I will re-read it.

"Question: When you say that you were driving along this road on the way to the dump and you observed this yellow-brown stuff that you say you observed, it was on the side of the road; is that correct?

"Answer: Right.

"Question: Did you observe that on any particular day?

"Answer: Like I started to say, we passed the truck different days.

"Question: I'm trying to find out, sir, are you (106) familiar with the Frieda's Bungalow Colony along that route that you took?

"Answer: No.

"Question: You don't know that?

"Answer: Not by name. I know which bungalow colonies are up there.

"Question: Do you know Glenwild Road?

"Answer: That's the main road, coming into town.

"Question: That's the main road you would take to the dump?

"Answer: Right.

"Question: You tell me where it was.

David Utegg, E.B.T.

"Answer: He was on a different road. We'd see him at different times, different time, places.

"Question: I want to know whether you saw him on Glenwild Road. If you know, tell me. If you don't remember, say so.

"Answer: I think I saw him up there.

"Question: Up where?

"Answer: On Glenwild Road up there, by those bungalow colonies.

"Question: Was that on April 24th, or on other days?

"Answer: Other days, too. We saw him at different places around there.

(107) "Question: I'm not asking you about different places, just answer the question. Did you see him on Glenwild Road?

"Answer: Yes.

"Question: On the 24th of April?

"Answer: Yes.

"Question: Is that what you said?

"Answer: Yes.

"Question: Right?

"Answer: Right.

"Question: Did you place the truck on that road before 12:00 o'clock on that day?

"Answer: Yes.

"Question: Right?

"Answer: Yes.

"Question: Were you going to the dump, or coming from the dump?

"Answer: Going to the dump.

"Question: You say that his truck was to your left as you were going toward the dump?

"Answer: I believe so, yes.

"Question: Right?

"Answer: I believe so, yes.

"Question: When you say, 'I believe so,' do you have knowledge, or are you guessing?

David Utogg, E.B.T.

(108) "Answer: I said yes.

"Question: Was it on the road or off the road to the left?

"Answer: Off the road.

"Question: That man that you say you saw on the road was to your right, is that right?

"Answer: Right.

"Question: Is that what you said?

"Answer: Correct.

"Question: When you saw him there, what was he doing, if anything?

"Answer: Cleaning something. I don't know what he was doing.

"Question: What was he using?

"Answer: A rake or something.

"Question: Rake or something? Okay. Was his face toward you or his back?

"Answer: His back.

"Question: His back was toward you?

"Answer: Yes.

"Question: When you passed him, his back was still toward you, is that correct?

"Answer: Right.

"Question: At any time as you passed by, did you hear any screams or any—any screams, any hollers?

(109) "Answer: No, if I did, I'd stop.

"Question: You didn't stop, did you?

"Answer: No.

"Question: Did anybody call after you as you went by?

"Answer: No, nobody ever called after me.

"Question: Keeping in mind that particular drive that you had from the demolition to the dump, do you know what you were carrying exactly, exactly what you were carrying on that day on that trip?

"Answer: On that trip?

David Utogg, E.B.T.

"Question: Yes.

"Answer: On that trip, we hauled pipe, lumber, bathtubs, furniture, anything we took that came along."

Mr. Edelman: Page 33, line 7.

Your Honor, there are two questions, but the first question has to be read because the second one is just a repetition.

The Court: All right.

Mr. Edelman: "Question: On this particular trip, when you say you saw this truck to your left off the road, and you saw this man in the road was standing there doing something with his back towards you, * * *"—and there is a statement by Mr. Bernhard. "He didn't say standing, he said he saw him.

(110) "Question: Would you say, sir, if you remember, and if you don't, please say so, what you were carrying on that truck at this time?

"Answer: I don't know if you have ever driven a truck."

Then there is line 19:

"Answer: Let me explain a little about it."

(111) "Question: Please don't explain. Just answer my question.

"Answer: If I can't tell you—I didn't haul just one thing.

"Question: I'm asking you one thing. If you can answer, please do. If you cannot answer, if you don't know, what you were carrying at that particular time, then say so.

"Answer: I can't answer that.

"Question: Thank you.

"Would you approximate the width of Glenwild road for me?

"Answer: The pavement?

"Question: When you drive your truck.

David Ulegg, E.B.T.

"Answer: A twenty—Around a twenty foot road.

"Question: Twenty foot road?

"Answer: Right—Twenty, twenty-two foot road.

"Question: Do cars park there?

"Answer: Off the side a couple of places, yes.

"Question: When you drive down that road"—

Mr. Sergi: "When you drove."

Mr. Edelman: Yes. I'm sorry.

"Question: When you drove down that road at the time you made the observations, the truck and the man, you went directly to the dump; is that correct?

(112) "Answer: Right.

"Question: After you dumped whatever you were carrying, where did you go?

"Answer: Back for another load.

"Question: Did you drive straight back on Glenwild Road where you came from?

"Answer: Right.

"Question: Same road?

"Answer: Same—Right.

"Question: How long did it take you to drop the contents of your truck and turn around, drive back up Glenwild Road?

"Answer: Fifteen, twenty minutes.

"Question: When you drove up Glenwild Road, did anybody flag you down, scream at you, call you in any way?

"Answer: No, nobody ever called at me, screamed at me.

"Question: Then, you drove back on Glenwild Road. Did you observe that truck which you said you observed when you made that first trip down? Was it still on the roadway?

"Answer: I don't remember—No.

"Question: You don't remember seeing it on the way back?

David Utegg, L.B.T.

(113) "Answer: No.

"Question: Do you remember whether the man was still there?

"Answer: No.

"Question: No, you didn't see him, or no, you don't remember?

"Answer: I don't remember, to be honest with you.

"Question: Did you go back to the demolition site from there?

"Answer: Right—back to the demolition.

"Question: Did you carry any more loads before the luncheon break?

"Answer: No.

"Question: Was that the last load you took that morning?

"Answer: The last load.

"Question: Back to the demolition site?

"Answer: Back there to the fishmarket. That's where we eat dinner.

"Question: Where is this fishmarket you are talking about? Is it on Broadway near the business area?

"Answer: Are you familiar with the town?

"Question: I have a map of the town here.

"Answer: When you get down to the light, the (114) blinker light, you turn to the right, and it is right there. There's the fishmarket. That is where you eat lunch.

"Question: Down in the main part of town?

"Answer: Yes. It's right on the main part of town.

"Question: Is that down by the shopping area?

"Answer: Right.

"Question: Did you go to this place on the way back to the demolition site after you dumped your load, or did you back to the demoltion site and then go to this place to have lunch?

"Answer: When I went, I went right down there, and I ate lunch. I ate lunch right down there.

"Question: Pardon?

David Utlegg, E.B.T.

"Answer: Back.

"Question: Maybe you didn't understand my question.

"Answer: All right.

"Question: After you dumped your load, you said you were on the way back to the demolition site.

"Answer: That is where we were.

"Question: I want to know whether you went to the demolition site, or whether you went to the fishmarket?

"Answer: I didn't go to the fishmarket. I never (115) went to the fishmarket. I went to the demolition site.

"Question: Where did you have lunch?

"Answer: That's what I was going to tell you. Down there by that ten hall, and was it—whatever they call it.

"Question: That is where you had lunch?

"Answer: That is where I ate lunch.

"Question: Did you go to the place where you had your lunch, directly there, or did you go back to the demolition site, and then go to the place where you were going to have your lunch?

"Do you understand me, sir?

"Answer: Back to the demolition. We went back to the demolition place.

"Question: From there you went to lunch?

"Answer: Right there. That's where we haul from. That's where we're hauling sand from there, and after that lunch, we were going to cover up from where we were in the morning, different parts of the day, like I told you here, before, when you say I was misleading you here.

"Question: Do you remember where the demolition job was at? Do you remember the name of the street?

"Answer: No, I don't.

"Question: Do you remember Coleman Street?

(116) "Answer: To be honest, I don't remember Coleman Street, no.

David Utlegg, E.B.T.

"Question: In order to get to Glenwild Road, do you remember the streets that you had to drive down?"

"Answer: The only reason I know Glenwild Road was because when we went to work on that job, that is the way we went to go.

"Harold and Brian told me to come down and I worked there for Sullivan Highway Products, and that is where I know where Glenwild Road was.

"Question: I'm trying to find—

"Answer: It's a long story, to tell you how to get there.

"Question: It's not really.

"Answer: Oh, yes, it is.

"The only way I remember, the way you worked on this job, that is how I remember where I had to go.

"Question: Did you have to drive down Broadway to get to Glenwild Road?

"Answer: No.

"Question: Did you have to drive down Green Street to get to Glenwild Road?"

Mr. Edelman: Well, he didn't answer that—Oh, yes, he did.

"Answer: From where do you mean?

(117) "Question: From the job site of Maggiolo's.

"Answer: You have to go on different streets.

"Question: What streets do you have to go down to get to the dump?

"Answer: I don't know. I couldn't tell you.

"Question: Do you remember Glenwild Road?

"Answer: Right.

"Question: But you don't remember any other streets?

"Answer: No.

"Question: Mr. Utleg, when for the first time did anyone tell you that you had observed"—

Mr. Sergi: Objection.

David Utegg, F.B.T.

It is not the proper question.

Mr. Edelman: I'm sorry.

"Question: Mr. Utegg, when for the first time did you tell anyone that you had observed this man working in the roadway as you were making your trip down to the dump on the day of the accident?"

The Court: Was that objected to?

Is this your cross examination?

Mr. Edelman: Yes.

The Court: So, you're not objecting.

Mr. Orseck: This is Mr. Sergi's examination.

Mr. Edelman: May I read the question again?

(118) "Question: When for the first time did you tell anyone that you observed this man working in the roadway as you were making your trip down to the dump on the day of the accident?"

"Answer: Right now. I never talked to nobody about nothing before.

"Question: This is the first time you said this to anyone?"

"Answer: Right.

"Question: You were at the office of Mr. Orseck, you say?"

"Answer: Right.

"Question: Did you tell him what you are telling us now?"

"Answer: No.

"Question: You never told anyone?"

"Answer: No.

"Mr. Sergi: I have no other questions."

Mr. Edelman: Examination now by Mr. Bernhard.

"Question: Do you remember what day of the week April 24 was?"

David Utlegg, E.B.T.

"Answer: No.

"Question: Do you remember what the weather was on April 24 in the morning?

"Answer: Well, it was clear weather. We only (119) worked in rain a couple of days, and it really wasn't raining, it was sprinkling.

"Question: Do you remember on April 24 whether it was sprinkling or whether it was a clear day?

"Answer: It had to be a clear day because we were sent home a couple of days when it rained.

"Question: Now, you say while you were having your lunch you were told by Harold & Brian about some accident; is that correct?

"Answer: Yes, after lunch.

"Question: Was it after you had your lunch?

"Answer: Right.

"Question: Were you still down in the area of the town hall where you had your lunch; is that correct?

"Answer: Right, yes.

"Question: Do you recall what they told you about an accident?

"Answer: I was getting in my car, truck, and I heard Harold and Brian talking about some fellow who got hurt.

"Question: Did they mention who the fellow was?

"Answer: Not then, no.

"Question: Did they say where it was that he got hurt?

"Answer: No.

"Question: Did they say—They didn't mention (120) it—Did they mention it on some other time?

"Answer: That afternoon on break time, they said the fellow got hurt pretty bad.

"Question: Did they tell you who the fellow was?

"Answer: They say it was the fellow working for the town.

"Question: Did they say where it was that he was hurt?

"Answer: No.

David Utlegg, E.B.T.

"Question: Did they tell you how he was supposed to have gotten hurt?"

"Answer: What do you mean 'how he got hurt'—hit or what?"

"Question: Did they tell you what kind of an accident he had that he got hurt?"

"Answer: We just had a coffee break. He said that in the diner there, and we all stopped for break time, and we all had coffee, and we talked to Milo.

"I asked Milo if he knew about the fellow, and he said, 'No.'

"Then, we went back and they were finished, and I think Harold or Brian bought. I know I didn't buy coffee that time. We used to split up paying.

"Question: What was the substance of the conversation?"

(121) Mr. Sergi: "Was that the substance of the conversation?"

Mr. Edelman: Sorry.

"Question: Was that the substance of the conversation?"

"Answer: I am telling you the story how things happened.

"Question: Listen to my question. I am not arguing with you.

"Answer: Okay. I'm not arguing, either.

"Question: Was that the substance of the conversation with Harold and Brian?"

"Answer: Well, maybe I talk too much.

"Question: Why don't you listen to the conversation.

"Answer: Go ahead.

"Question: What Harold and Brian told you, that some fellow had gotten pretty badly hurt, was that about what they said to you, or did they tell you more?"

"Answer: Yes—They—We talked about different things. Yes, we talked about that.

David Utlegg, E.B.T.

"Question: You talked about the fellow who got hurt?

"Answer: I didn't think I had nothing to do with it, so I went over to Milo.

(122) "Question: Did they talk to you about how they heard the fellow had gotten hurt?

"Answer: A little bit.

"Question: What do you recall? Do you remember which one told you about it? Or did they both tell you?

"Answer: I went with Milo. We went in last. Brian and Harold went in together.

"Maybe I'm going off the subject with you, but they went in first. Milo and I went in last.

"Sometimes Milo wouldn't eat with us. He wouldn't go in, but a couple—lots of days he would sit in the truck or talk to somebody else.

"Question: When you and Milo went in, would Brian and Harold already be in the diner?

"Answer: Yes.

"Question: Were they sitting at a table, or at a counter?

"Answer: Sitting at a counter.

"Question: You sit with them?

"Answer: I sat down, and then Milo was sitting by himself. So I sat by him, and I sat up, ordered and sat with Milo, and finished.

"Question: When you sat with Harold and Brian, for a couple of minutes, did you hear them discussing an accident that had happened to some fellow who had (123) worked for the town?

"Answer: Right. That's what they were talking about.

"Question: Did you hear them say how the accident happened?"

Mr. Edelman: And then, line 20—

Mr. Sergi: Line 20—

Mr. Orseck: Which line do you want me to read?

Mr. Edelman: Line 20.

David Utegg, E.B.T.

Mr. Sergi: It starts, "The Witness."

"Answer: Did I hear too much?

"Question: Did you hear anything?

"Answer: I just heard that he got hurt, that he got hit in the head with something, that he was pretty well battered, and it doesn't have nothing to do with me, because I went over to Milo, because he was sitting by himself on the other side of the booth.

"Question: When you were making that trip to the dump before you had your lunch, was that man Alvin who usually followed you in a pickup truck, was he behind you?

"Answer: I don't know if he was on that trip. He follows us lots of times. If he didn't follow, he was going back and forth lots of times during the day."

(124) "Question: While you were at the dump that morning before lunch, did any of the other trucks pass you on the way back to the dumps?

"Answer: Yes, we passed each other lots of times.

"Question: I mean on that morning. That's the only morning we are concerned with, Mr. Utegg.

"Answer: I think so.

"Question: Do you remember whose truck it was that passed you?

"Answer: I don't know.

"Question: You don't know.

"Incidentally, is Harold your brother?

"Answer: Harold is my brother.

"Question: Do you remember whether it was your brother's truck?

"Answer: Well, I pulled in behind him. We had a break-lunch. It must have been me that followed when he went back.

"Question: This man that you say you saw by the side of the road with a rake whose back was toward you, was he bending over, was he standing up, what was he doing?

David Utegg, E.B.T.

"Answer: He was moving around there, stooped down. He was standing up.

"Question: Well, as you approached him, you could (125) see him, isn't that true?

"Answer: Right.

"Question: How far were you from him when you first noticed him?

"Answer: You could see quite a ways up there.

"Question: I wasn't there. I am trying to find out from you.

"Answer: You could see a good distance, 500 feet or more.

"Question: Is that how far you were from him, some 500 feet when you saw him?

"Answer: Right.

"Question: And he was in your vision for about 500 feet when you approached him?

"Answer: Yes. You could see that far ahead.

"Question: During that time, was his back"—

Mr. Edelman: Pardon me.

"Question: During that time, his back was toward you all the time?"

Mr. Edelman: Then, the answer is on line 21, after the colloquy.

"Answer: I don't know if he was or he wasn't.

"Question: Mr. Utég, during this 500 feet that you were driving, was that man that was on the side of the road within your vision?

(126) "Answer: Yes. I follow you. I followed him so far.

"Question: During this time while you were driving the 500 feet was his back always toward you?

"Answer: He was moving around, yes, with his back to me.

David Ulegg, E.B.T.

"Question: This truck that was on the other side of the road, on the left side of the road, was the front of the truck facing toward you, or was it facing toward the direction you were going?

"Answer: I think it was facing me.

"Question: When they loaded sand onto your truck, what did they use to load the sand?

"Answer: Well, I always got loaded with a 998 motor.

"Question: When they load the debris onto your truck do they use the same front-end motor to load?

"Answer: Two different motors. That's all we got loaded with.

"Question: Were they the same type?

"Answer: One was a tract. I think the other was—One was tract, the other was a 998. We only had one of those.

"Question: Do you know if any of the loaders were out of operation on April 24?

(127) "Answer: That, I don't remember."

Mr. Edelman: Your Honor, I was wondering—We have about ten pages, and I don't know if the jury—

The Court: Try to finish this deposition, and then we'll have a recess.

Mr. Edelman: Thank you, your Honor.

This is continued examination by me, Mr. Edelman.

"Question: As far as Glenwild Road, that's the road you took when you had a load to go to the dump; is that correct?

"Answer: Right.

"Question: Isn't it a fact that the only thing you used to go to the dump with was the debris from the demolition job?

"Answer: Right.

"Question: Isn't that a fact?

David Utegg, E.B.T.

"Answer: That's all we hauled up there.

"Question: Therefore, when you hauled the sand, you would take it and put it in the building in the town; is that right?

"Answer: Where we cleaned up, leveling things up.

"Question: So, the only thing you had on your truck was the material from the building, or it was empty going from the dump; is that right?

"Answer: Right.

(128) "Question: Now, also you stated that you spoke to Mr. Orsek, the lawyer, at his office; is that correct, sir?

"Answer: Right.

"Question: Isn't it a fact that when you spoke to his office, he spoke to you about this accident? Isn't that so?

"Answer: Yes. He didn't ask me nothing personal.

"Question: But he asked you, isn't it a fact, about what you remember about this accident? Isn't that so?

"Answer: Yes.

"Question: Isn't it a fact, whatever you knew about this accident or whatever you were doing that day, isn't that so?

"Answer: Right, yes.

"Question: Isn't it a fact that you told him more or less what you told us to ? Isn't that so?

"Answer: Yes. He didn't ask me personally.

"Question: He didn't ask you any personal questions?

"Answer: No."

Mr. Edelman: Then, there's some colloquy, and a continuation of the answer on page 53.

"Answer: So, I went there with my brother Harold, (129) and I went out together—

"Question: Hold it.

"Isn't it a fact that he didn't ask you any personal questions about yourself?

David Ulegg, F.B.T.

"Answer: No.

"Question: But he asked you about this accident; is that correct?

"Answer: Right.

"Question: And you told him everything you knew about it?

"Answer: Yes.

"Question: And you told him everything you knew about the man standing on the side of the road near the catch basin working? Isn't that correct? Isn't that so?

"Answer: Yes.

"Question: You told him about the truck, the town truck being parked on the other side opposite this man; is that right?

"Answer: Yes.

"Question: On Glenwild Road?

"Answer: Right.

"Question: And this is substantially what you testified to today; isn't that a fact?

"Answer: Right."

Mr. Edelman: Examination by Mr. Sergi.

(130) "Question: When you were speaking to Mr. Orseck, who else was there besides your brother?

"Answer: My wife—No—My wife wasn't there.

"Question: While you were there and talking to Mr. Orseck, do you know whether he was writing anything down?

"Answer: No, he didn't write nothing I know of.

"Question: Do you remember whether you signed anything?

"Answer: I didn't sign anything.

"Question: You didn't sign?

"Answer: No.

"Question: Did he also speak to your brother in your presence?

"Answer: Yes.

David Utegg, E.B.T.

"Question: Did he ask your brother the same questions that he asked you?

"Answer: The same line of questions, right. He asked us together. We both were sitting there.

"Question: In the presence of your brother, you told Mr. Orseck what you are telling us now?

"Answer: Yes.

"Question: Right?

"Answer: Yes."

Mr. Edelman: The next—55 and 56 is colloquy—

(131) Mr. Sergi: Are you skipping line 5 on page 55, Mr. Edelman?

Mr. Edelman: I can't hear you?

Mr. Sergi: You are skipping line 5 on page 55?

Mr. Edelman: If there's an answer to it, I'll gladly read it. There's no answer.

The Court: Go ahead, Mr. Edelman.

Mr. Edelman: Page 57, line 10.

"Question: Mr. Utteg, now I understand you have spoken to Mr. Orseck and told him what you are telling us here today, and that was last week; is that correct?

"Answer: Right.

"Question: Between April 24, 1972,—Okay?

"Answer: Right.

"Question: And last week in Mr. Orseck's office, did you speak to anyone and tell them what you are telling us here today?

"Answer: No.

"Question: And at the time you were in the diner or whatever it was that you were having a coffee break with the other drivers—

"Answer: Yes—

"Question: (continuing) —did you tell anyone at that time"—

Mr. Sergi: "There at that time."

David Utlegg, E.B.T.

(132) Mr. Edelman: Well, there was no answer, and no answer for the next question.

Next question, page 59.

Only a few more pages, your Honor.

"Question: I will ask you again.

"You just testified that you spoke to Mr. Orseck last week, and you told him what you are telling us here today?

"Answer: Right.

"Question: Is that correct?

"Answer: Yes.

"Question: And you also testified that on the day that this is supposed to have happened, during the coffee break you met with other drivers in the diner or somewhere; is that correct?

"Answer: Right.

"Question: And that somebody mentioned the fact that somebody was hurt, and was hit in the head, and was hurt pretty bad; is that correct?

"Answer: Right.

"Question: I want to know whether at that time you told anyone what you are telling us today"—

Mr. Edelman: And the answer is on line 25.

"Answer: On that day, you mean?

"Question: That day.

(133) "Answer: Only once I talked to the people in the diner.

"Question: Did you tell them anything?

"Answer: I didn't tell anyone. They told me.

"Harold and Brian were talking.

"Question: Did you tell anyone that day what you are telling us here now? Here today?

"Answer: No."

Mr. Edelman: Now, by Mr. Bernhard.

Dr. Salvatore Cosentino, for Plaintiffs, Direct

"Question: One question.

"Did Maggiolo Brothers or Corporation have any other trucks on that job on that day, let's say from Kingston, New York?

"Answer: Not that I know of."

Mr. Edelman: That's the entire examination, your Honor.

The Court: We will take a five minute recess.

(Recess taken.)

* * *

(192) SALVATORE COSENTINO, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

* * *

(194) *Direct Examination by Mr. Edelman:*

* * *

(196) The Clerk: Doctor's records marked plaintiff's exhibit 4 for identification, consisting of three documents.

(So marked.)

A. I saw Robert Elliott on April the 24th, 1972.

Q. And at that time did you obtain a history of what had occurred to him that morning? A. Yes, I did.

Q. And what was the purpose of your obtaining a history? A. The history gives us some background as to the cause of the injury—the related causes, anyway.

Q. Was that history necessary in order for you to make a proper diagnosis? A. Yes, it always is.

Q. Is this history usually taken as a regular course of business, virtually, in your profession? A. Yes.

Q. Is it taken in hospitals? A. Yes.

Dr. Salvatore Cosentino, for Plaintiffs, Re-direct

Q. Did you take it to make a diagnosis and determine the treatment? A. Yes, yes.

Q. Please tell the Court and jury what history you obtained from Mr. Elliott.

(197) Mr. Sergi: Did he get it from Mr. Elliott?

Mr. Edelman: All right. I will ask him the question.

Q. Did you get that history from Mr. Elliott? A. Yes.

Q. Please tell the Court and jury what history you obtained that morning on April 24, 1972. A. I wrote on that day:

"Accident. Hit in face by a plank which fell off a passing truck while working." Poor English, but—

Mr. Sergi: What was the last three words?

The Witness: I said, "It is poor English," but we write these things in a hurry.

Q. After the history, did you make an examination? A. Yes.

Q. Please tell us what your examination consisted of and what your findings were. A. We noted as soon as he was brought into the office that the lesions actually were concentrated to the face area and noted that there was an extensive laceration extending—I should read this—"extensive lesions of the face and nose. Lacerations of the left side of the face extending deep to the bony structures and involving the nose, left side of the face and the upper lip."

* * *

(267) The Court: Anything further, Mr. Edelman?

Re-direct Examination by Mr. Edelman:

Q. As part of your record, sir, plaintiff's exhibit 4 in evidence, are these considered part of your records that were kept in the regular course of your business?

Robert W. Elliott, for Plaintiffs, Direct

Mr. Sergi: No objection. I withdraw my objection to the offer of that report into evidence.

Mr. Edelman: Thank you.

The Court: Let it be marked.

The Clerk: One document from plaintiff's exhibit 4, now received in evidence.

(So marked.)

Mr. Edelman: At this particular time, your Honor, I would like to read what is in evidence.

May I first, your Honor, show this generally to the jury?

The Court: Yes. Without any instruction.

Mr. Edelman: No comments.

The Court: Do you want to pass it around? You can pass it around.

Mr. Edelman: May we pass it around?

The Court: Yes, just pass it around. You can look at it. Take as much time as you want to go over it.

* * *

(292) ROBERT W. ELLIOTT, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Edelman:

* * *

(302) for this work? A. No, I didn't.

Q. How about in the wintertime when there was snow on the ground, did you have anything to do regarding snow removal also? A. Yes, I plowed the roads.

Q. Was that for the same salary? A. Yes.

Q. During this time,—by the way, did there come a time when you got a little promotion in this big job of yours? A. Yes.

Robert W. Elliott, for Plaintiffs, Direct

Q. When did you get the promotion? A. It was in '71.

Q. Before this accident? A. Yes.

Q. What promotion did you get? What job? A. I was Superintendent of Public Works.

Q. Well, that's a fancy title. How much were you getting for that, Superintendent of Public Works of the Village of Woodridge? A. About a hundred thirty, thirty-five dollars.

Q. By the way, at the time of the happening of this accident how much money were you making as a superintendent

* * *

(305) Q. Is there a reason why you remember it? A. I have a daily reminder.

Q. What was the date of the accident? A. April 24th, 1972.

Q. About what time of the day did this accident occur? A. About 11:30.

Q. What day of the week was it? A. Monday.

Q. Do you know whether or not it had rained at all over the weekend? A. Yes, it did.

Q. Was it a heavy rain, so far as your memory is concerned? A. Yes, it was.

Q. Pardon me, do you want to take a little rest? A. I'd like to wipe my eye up.

Mr. Edelman: May he do that?

The Court: Do you want to step down and do it?

(Witness steps down from the stand.)

The Witness: I just need a little tissue.

The Court: You can take that tissue to the stand with you.

By Mr. Edelman:

* * *

Robert W. Elliott, for Plaintiffs, Direct

(307) Q. I cannot hear you. A. I was up on one street—

Q. What street did you go up first, before you went to Glenwild Road? A. Highland Avenue.

Q. What was the condition of the roads on Highland Avenue, just generally? A. Mud was running down the street because the basins were clogged.

Q. And what, if anything, did you do regarding Highland Avenue? A. I cleaned the mud off the street and off the catch basin.

Q. By the way, in the area of Highland Avenue was there any demolition work going on? A. Yes, sir.

Q. And where was the demolition work going on? A. It was on Highland Avenue where I was cleaning it off, right besides it, that's why the mud was coming down, it was washing down from the demolition work.

Q. Can you tell us what sort of demolition work was being done in that area? A. They were ripping down buildings.

Q. Do you know who was doing that? (308) A. Maggiolo.

Q. As part of your job, did you happen to be informed of who was doing the demolition, as the Superintendent of Public Works? A. I didn't hear you.

Q. As part of your job, was it required for you to find out who was doing the demolition work on Highland Avenue? A. Yes.

Q. Did you find out who it was? A. Yes.

Q. Who was it? A. Maggiolo.

Q. About how long before this occurrence was the demolition work being done by Maggiolo in the Town of Woodridge near Highland Avenue? A. Weeks.

Q. And during that time did you see the truck that the Maggiolo Corporation was using on this demolition job? A. I saw them all through the Village.

Q. Can you tell us generally, give us a description of the trucks that were being used by the Maggiolo Cor-

Robert W. Elliott, for Plaintiffs, Direct

poration in connection with this job? (309) A. They were using dump trucks. They were red and they were ten-wheel tandem dump trucks.

Q. Were they all red? A. Yes.

Q. Was it plain red, bright red, dark red, what sort? A. Red, all red.

Q. During that time also, did you see the drivers who were driving these dump trucks for Maggiolo in the village? A. Yes.

Q. Were you—would you be able to identify them generally as far as if you saw them at that time? A. Yes.

Q. Now, to come down to the day of this occurrence, while you were on Highland Avenue that morning, did you see any demolition work being done on Highland Avenue that morning before your accident? A. Yes, sir.

Q. Tell this jury what you saw at that time? A. They were loading debris on these dump trucks.

Q. They were loading debris on the dump trucks? A. From the buildings.

* * *

(311) A. On the doors of the dump truck.

Q. And what were the markings generally saying? A. Village of Woodridge and the seal.

Q. Thank you.

Now, to come back to the day of this accident before the occurrence, you stated that you saw this demolition work being done that morning on Highland Avenue and the—by Maggiolo and they were loading their dump trucks; is that correct, sir? A. Yes, sir.

Q. By the way, is there a dump near or in the Village of Woodridge? A. It's going out of the Village of Woodridge, yes.

Q. In order to get from Highland Avenue to this dump, the best way to get there, would that be through Glenwild Road? A. That's the only way, yes, sir.

Robert W. Elliott, for Plaintiffs, Direct

Q. Incidentally, do you know Joe Shack? A. Yes, he lives in the Village of Woodridge.

Q. How long have you been generally acquainted with Joe Shack? A. Since I worked for the Village of Woodridge.

Q. Did you know whether he had any association with

* * *

(313) Mr. Sergi: What's that?

Mr. Edelman: Whoever wanted to have it.

Q. Was this excess dirt? A. Yes.

Q. By the way, the Village of Woodridge, is this a comparatively small community? A. I can't hear you.

Q. Is the Village of Woodridge a comparatively small community? A. Yes.

Q. In any event, coming back to April 24th again, on the morning of this accident, did you do anything sometime around 11:00 o'clock regarding visiting the premises where the Maggiolo Corporation was doing some work in connection with this demolition? A. Yes.

Q. Please tell this Court and jury what you did? A. They were loading some gravel, sand, onto—with their front-end loader, and I come by there on my way down from Highland Avenue—

Mr. Sergi: Excuse me, I can't hear all of it. If he would just speak louder.

The Court: Just tell me you can't hear it and I'll have the Reporter repeat it.

* * *

(318) Mr. Edelman: I will withdraw it.

Q. Where did the board come from? A. From the back of the side of the truck.

Q. Did you do anything to try to avoid getting hit? A. Yeah, I ducked and it hit me in the face.

Robert W. Elliott, for Plaintiffs, Direct

Q. Was there any warning of any kind that this board would come off, come flying off, or come off this side of the truck?

Mr. Sergi: Objection to the form of the question. He used the word flying. It was never used by this witness.

The Court: Please rephrase it, Mr. Edelman.

Mr. Edelman: All right.

By Mr. Edelman:

Q. Was there any warning given to you of any kind that this board would become flying—would come off the side of the truck and hit you in the face? A. No.

Q. Was there anything you could do to avoid it?

Mr. Sergi: Objection.

The Court: Sustained. It calls for a conclusion.

Q. Could you have avoided this particular object?

(319) Mr. Sergi: Objection.

The Court: Sustained.

What, if anything, did you do when you saw the board?

The Witness: I tried to duck.

The Court: Did you see it before it came in contact with your face?

The Witness: Sir?

The Court: Did you see the board before it came in contact with your face?

The Witness: Yes.

The Court: For a split second or so?

The Witness: Yes, then I tried to duck to get out of its way and it hit me in the face.

By Mr. Edelman:

Q. Incidentally, did you recognize the truck as it was coming down the road, coming towards you? A. Yes.

Robert W. Elliott, for Plaintiffs, Direct

Q. Whose truck was it? A. Maggiolo's.

Q. Could you describe the truck? A. It was a red dump truck, Ford, ten-wheel tandems.

* * *

(327) A. It was Dr. Bessen.

Q. About how long did you remain in Liberty Hospital? A. About an hour, hour and a half. I don't know.

Q. During that time, did they take X-rays? A. Yes.

Q. During that time, did they also take a history from you at the hospital as to how the accident happened? A. Yes.

Q. Do you know whether or not they wrote it down? A. I don't know.

Q. In any event, did you tell them how this accident happened? A. Yes.

Q. And did you tell them substantially what you told us here before? A. Yes.

Q. And then after that time—By the way—Were you removed to another hospital? A. Yes, I was.

Q. What hospital were you removed to, please tell this Court and Jury. A. Vassar Brothers Hospital in Poughkeepsie.

Q. And by the way, how did you get from the Liberty (328) Hospital or the Community Hospital in Liberty to the Vassar Hospital in Poughkeepsie? A. My wife took me, and my sister-in-law.

Q. All right.

Now, when you got to the Vassar Hospital in Poughkeepsie, at that time, did they take a history from you? Did they ask you how this accident happened? A. Yes.

Q. Did you tell them? A. Yes.

Q. Did you tell them that the accident happened substantially as you testified here this afternoon? A. Yes, sir.

Q. And incidentally, how did you feel from the time you got to the Liberty Hospital to the time they sent you

Robert W. Elliott, for Plaintiffs, Direct

to the Vassar Brothers Hospital in Poughkeepsie? A. I felt miserable.

Q. Well, tell us, just generally tell us, what parts of your body hurt you? A. My whole head hurt, my face, my lip.

Q. Incidentally, were you able to see at that time—at that particular time, were you able to see okay? Was there any difficulty or difference in your vision? A. After I left the Liberty Hospital, I was seeing double.

* * *

(341) *Direct Examination by Mr. Edelman (Continued):*

* * *

(549) "Answer: No."

Do you remember that question and answer, those questions and answers? A. Yes.

Q. Now if we may go back again, you say you hired the services of Mr. Orseck around May of 1972, you were at your father-in-law's farm? A. Yes, sir.

Q. And you signed a retainer, you signed some kind of an agreement? A. Not there.

Q. Where did you sign the agreement? A. I signed a paper in his office.

Q. How long after would that be? What month, approximately, or how many days or months or weeks, after you got out of the hospital? A. Couple of months.

Q. You were out of the hospital the end of April, this would come about June of '72, is that correct? A. Yes, sir.

Q. At that time, did you tell him that it was a Maggiori truck that was involved in this accident? A. No, sir.

* * *

Robert W. Elliott, for Plaintiffs, Direct

- (582) Mr. Edelman: Your Honor, at this time, I offer the hospital record, pursuant to agreement, or Robert Elliott at the Community General Hospital, Liberty Division, showing treatment on 4/24/72.

The Court: Any objection, gentlemen?

Mr. Sergi: No objection.

The Court: Let it be marked.

Mr. Sergi: No objection, except to history, your Honor.

The Court: The hospital record is admitted into evidence, the history is excised from the record.

Mr. Edelman: May I show your Honor the history?

The Court: Sure. There is nothing in it to change my opinion at all.

Mr. Edelman: All right.

Have it marked.

The Court: Marked in evidence. Anything else?

Mr. Edelman: At this time, I want to read the—

The Clerk: Four page hospital record of Community General Hospital, Liberty, New York, marked Plaintiff's No. 8 for identification.

The Court: The lawyers want me to read the appearances in the deposition.

* * *

- (596) Mr. Fetell: Move to strike the comment.

The Court: Strike comments, history is excluded.

Mr. Edelman: Laceration sutured by Dr. Cosen-
tino, Woodridge; and then it has laceration of lip,
face and below eye, edema around nose and mouth
with diplopia; then it says, referred to Dr. Bessen
and underneath it it says no known allergies, then
it says Vassar Hospital Poughkeepsie.

At this time, your Honor, I call Mr. Schacht.

Joe Schacht, for Plaintiffs, Direct

JOE SCHACHT, called as a witness, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Edelman:

Q. State your full name? A. Joe Schacht.

Q. And your address? A. Woodridge, New York.

* * *

(598) Q. How long have you been married? A. 21 years, —with Freida Schacht.

Q. Do you and your wife run a bungalow colony in Woodridge, New York? A. Yes.

Q. How long do you own this bungalow colony? A. 21 years.

Q. And do you remember April 24, 1972, when an accident happened to Bob Elliot? A. Yes I do.

Q. And before this accident, did you know Bob Elliot? A. Just casually.

Q. How did you know him? A. Just by working, see him in the village every day, he was working in the village.

Q. Did you know that he worked for the Village of Woodridge? A. Yes, sir.

Q. Did you know that he was connected with the Department of Public Works in Woodridge, something to do with the roads and sewers? A. Yes.

Q. And catch basins?

* * *

(601) Q. Were you supposed to pay him any money for this or was this free? A. That was free.

Q. And then did there come a time when Elliott came with the village truck to your colony or to your place with some dirt? Elliott bring some dirt? A. Any other time?

Q. I withdraw it.

Joe Schacht, for Plaintiffs, Direct

On April 24th, the day of this accident, did Mr. Elliott bring some dirt to your bungalow colony? A. Yes, he did.

Q. About what time of the morning was that?

Mr. Sergi: Objection to the form of the question.

The Court: What time of day?

Q. What time of day was it? A. Oh, around 12 o'clock, something like that, or between 11 and 12.

Q. And at that time where were you when this happened? A. Well, I was doing some work in the building that's located next to the road to Glenwild Road.

Q. Will you tell this Court and jury what happened during the time, if anything—I withdraw it.

Can you tell how Mr. Elliott brought the dirt on to your place? (602) A. While I was working on the building, while I was there, I saw the village truck backing into my driveway and I left my tools down, I put my tools down, and I walked up to the truck and I saw it was Mr. Elliott and he asked me how far he could back up so he could drop the dirt, and I told him to keep backing up when he gets to the right place I'll tell him where to stop, and he backed the truck down and then I told him—then he lifted the dump and the dirt unloaded.

Q. Was there any trees in the place where they dumped this dirt? A. No trees at all.

Q. Was it clear space? A. Yes, sir.

Q. And how far back was it from the beginning of your driveway that he dumped this load? A. About 75 feet or so, maybe more, take a few.

Q. Then what happened after that? A. When he unloaded the truck he dropped the box, the dump and he asked me if I could borrow a shovel—if I could borrow him a shovel.

Q. Did you give him a shovel? A. He told me he shovel and the handle got loose. I walked up to the

Joe Schacht, for Plaintiffs, Direct

garage and I picked up a shovel and hand (603) it to him.

Q. And then where did the village truck and Mr. Elliott go? A. He drove out, when he passed the gate, my property, he made a sharp right turn and stopped on the shoulder of the road.

Q. Was he parked anywhere on the road or was he completely off the road? A. Completely off the road.

Q. Tell this Court and jury if anything happened during that time while he was on your property, any accident of any kind? A. There was no accident of any kind.

Q. After he parked the truck— A. Pardon me, as far as I'm concerned.

Q. After he parked the truck, where did Mr. Elliott go? As far as you saw? A. Well, he picked up my shovel and a rake he had of his own, I suppose, and he walked across the road to a catch basin.

Q. Was this catch basin opposite your property on the other side of Glenwild Road? A. It was opposite the building that I worked on, I was working on, opposite that building.

Q. And did you see Bob Elliott do some work around (604) that catch basin? A. Yes, sir.

Q. Please tell this Court and jury what you saw as far as the work, that Bob Elliott was doing on that catch basin on the other side of the street. A. I understand there was a lot of leaves there on the catch basin and the basin was plugged up, it was leaves and a lot of sand that was left over from the winter months, and he was raking it off and using the shovel, and that's it.

Q. And while that was going on, where if anyplace, did you go? A. I went back to the building to finish my work.

Q. Was that building either in front of or along side this truck? Was it in front of the truck? A. No, it wasn't in front, away from the truck.

Joe Schacht, for Plaintiffs, Direct

Q. How far was the truck from the building that you were going to or at, roughly? A. About 25 feet.

Q. Were you able to see Mr. Elliott working? Was there anything to obstruct your vision of Mr. Elliott? A. I could see Mr. Elliott perfectly.

Q. Please tell this Court and jury in your own words everything that happened from that time until you found out that an accident occurred?

(605) Mr. Sergi: I object to the form of the question.

The Court: You mean tell the jury what happened thereafter.

Mr. Edelman: That's right.

The Court: All right.

A. While I was working at the building I drew my attention to a truck that was coming up the hill. He was going very slow, he had it in low gear and I looked around. I turned my head around, I watched a red truck, red dump truck coming up and got up the hill, and it was going very slow and it continued going slow, and it was loaded with debris. I could see the debris.

Q. Where was the debris? A. Above the box of the truck, the body of the truck.

Q. Please continue. A. And it kept going and all of a sudden I heard a scream and I turned my head toward Mr. Elliott and I saw him lying down.

Q. Where was he lying in relation to the catch basin? A. Next to the basin.

Q. What was the color of this truck? A. It was a red truck.

Q. Had you seen some more trucks before that? A. Many of them.

(606) Q. Where? A. Passing on the road going up and down the road, going up loaded and coming back empty.

Q. And is there a dump at the end or past your bungalow colony at Glenwild Road? A. Yes, sir.

Joe Schacht, for Plaintiffs, Cross

Q. Were you ever in the village where the demolition for urban renewal work was going on? A. Yes, sir.

Q. And did you see those trucks working on demolition or similar trucks? A. I did.

Q. When you heard this scream what if anything did you do? A. I went up to him and he was lying down like in a daze. Blood was running over his face, his left side and I kept shaking him.

I said, "What happened?", and he was mumbling. He said something—"I'm hurt."

So, I picked him up. I stood him up and he said, "Take me to the hospital."—"Take me to a doctor." rather.

Q. Did you see any board near him? A. There was a plank lying there.

Q. Thank you ever so much. Please continue.

* * *

(608) *Cross Examination by Mr. Sergi:*

* * *

(624) A. I was there, yes, sir.

Q. And did he point out to you that part of a branch from a tree was laying on top of the pile of dirt that was lying there in the driveway that was just delivered there by Mr. Elliott? A. There was no branches laying there.

Q. Pardon? A. There were no branches laying there.

Q. When Mr. Newmark came there were no branches laying there? A. That's right.

Q. In fact, do you deny that Mr. Newmark came to your property and spoke to you and showed you a branch that came off a tree adjacent to the pile that was lying on the road and showed you the branch and showed you that the branch had blood on it? You deny that? A. I do.

Q. Do you deny that laying on that pile of dirt was a pruning tool that was used to cut branches off a tree? A. I deny it.

Ralph Peimer, for Plaintiffs, Direct

Q. You deny it? A. Yes.

Q. You also deny that Mr. Elliott was hurt on your property; is that correct?

* * *

(646) RALPH PEIMER, called as a witness on behalf of the plaintiff, having been duly sworn by the Clerk of the Court, testified as follows:

The Court: You may proceed, Mr. Edelman.

Direct Examination by Mr. Edelman:

* * *

(660) Mr. Sergi: I understand what you are talking about.

The Court: But I don't think that any prior consistent statements could not have happened, but that is their theory, and I think that is what you are saying and that is what I think you have always been saying and intimating in cross examination, that they were reinforced in the lawyer's office.

In other words the lawyer asked, Tell me what happened, and they said that a Maggiolo truck came and hit a tree. The lawyer said, that is fine, there is liability.

Now when you point a finger at Mr. Edelman and Mr. Orseck, what you are saying also is that they may very well have said, Well, this happened on Mr. Schacht's property, except that the prior history destroys that version.

They said to Doctor Cosentine and in the hospital record, at Liberty Hospital, that a plank of lumber fell off a Maggiolo truck, and that was before Elliott or his father-in-law ever saw Mr. Orseck, so how—

Ralph Peimer, for Plaintiffs, Direct

Mr. Sergi: Your Honor, you are offering an—

Mr. Bernard: Your Honor, let me say that the (661) magic words are, "While on the job," because the original intention here was to implicate not a third party—

The Court: That is a question for the Jury, but I can see, and I don't tell you not to pursue the theory, that you can feel that this was hatched in Mr. Orseck's office, and I am almost embarrassed to say it, I know something of Mr. Orseck's reputation, I can't conceive it happening, but that doesn't mean you shouldn't pursue it.

The fact that he told Dr. Consentine and the Liberty Hospital that a plank fell off the truck and hit him in the cheek while he was on the job, while he was cleaning sewers, indicates to me that at the very worst, and I don't say it happened, they came in and said to Mr. Orseck, You know a branch hit me in the face, it crushed my cheek, but that was for compensation.

I think we ought to try to sue Maggiolo, say a plank fell off."

And Mr. Orseck said, Well, the Maggiolo—the third party claim is certainly better.

* * *

(668) both hospital records, the history in the first hospital record admitted as germane to being treated, the first, the Liberty Hospital and also Vassar.

The Court: I will make sure to tell the Jury that the repeated histories given to doctors for medical treatment has no relationship to the burden of proof which the plaintiff has in showing how the accident happened, it is introduced solely for the purpose of treatment.

Mr. Edelman: All right, good, fine.

Ralph Peimer, for Plaintiffs, Direct

(At 11:05 the Jury took its place in the Jury box.)

The Court: Members of the Jury, the question has arisen as to whether Doctor Peimer is a treating doctor or whether he was asked to examine the plaintiff for the purpose of giving testimony in the case.

Now you must understand that both services are perfectly legitimate, there is nothing wrong with a plaintiff in litigation going to a doctor and saying, Doctor, I want you to examine me and I want you to come into court and tell the Jury what my condition is.

However, only a treating doctor may testify as to what the plaintiff said about the happening of the accident, the theory is that a treating doctor requires a complete history, and incidentally a history doesn't (669) mean alone how the accident happened, a history can go into who was your mother and father, at what age did they die, what did they die from, do you have any sisters and brothers, do you have diabetes, did they have diabetes—everything about the patient and his family, and how the accident happened is only a part of it, but that is the part that the plaintiff asks about because it is related to the treatment for the injury claimed, and I underscore "treatment".

But if a doctor examines a plaintiff for the purpose of testifying, since he is not the treating physician he couldn't require that, so it is eliminated from his testimony.

Now I am allowing it because I don't know at this point, and I think it is a fact question for the Jury, but for all purposes, whether you believe that Doctor Peimer is a treating physician or whether he is a physician that came in and is just telling

Ralph Peimer, for Plaintiffs, Direct

you about the condition and not as a treating doctor, you cannot use what the plaintiff told the doctor or anybody else about how the accident happened in order to support the plaintiff's credibility as to how the accident happened.

Again I instructed, and I repeat it, the plaintiff (670) took the stand and he told you how the accident happened, and at the proper time I will instruct you on how you determine credibility, how you weigh believability.

But one type of evidence concerning liability you may not use, and that is that he said it before. The mere fact that he said it before doesn't make his testimony any more believable.

So with that instruction I will allow the continued examination.

Mr. Edelman: Thank you.

* * *

(673) He had a nasal fracture. He had a fracture of the orbital rim here. And somebody had put in an implant to elevate the eye. This happens to be a—plastic thing called silastic. That was because he had had some double vision at that time and this was to elevate the eye, because it might tend to fall once you destroy its support.

Q. Did it destroy—destroy what orbit are you referring to? A. The support of the eye itself.

Q. Okay. Thank you. A. That there was a laceration, a cut, if you want, of the left side of the face, a fracture of this area here (indicating).

Q. Showing the left side, below and to the right of the eye, the left eye? A. Right. Constant headaches, especially on the left frontal. That's here and this area. He—

Q. Which area did you say, doctor? A. What?

Q. Which area were the headaches?

Ralph Peimer, for Plaintiffs, Cross

Mr. Sergi: Your Honor, I have no objection to the doctor refreshing his recollection but he seems to be reading from his report.

* * *

(710) *Cross Examination by Mr. Sergi:*

* * *

(730) A. This note is dated February 9, 1973.

Q. And it is addressed to Mr. Edelman; is that correct? A. It is addressed to Mr. Edelman, I see I have misspelled his name.

Q. Do you see the first line, as you read it, doctor, and it states:

"As you know, I saw Mr. Robert Elliott of Neversink Road, Liberty, New York, on June 12, 1972."

Do I read that correctly? A. And that he was accompanied by an attorney from Liberty, New York.

Q. And that he was accompanied by an attorney from Liberty, New York, on the very first visit to your office, June 2, 1972.

Does that refresh your recollection? A. That is correct sir.

I didn't have it in my notes and I didn't remember it.

Q. And now you say that he stated what his occupation was, is that correct, at that time when you set forth what he stated, doctor, and can you tell us whether it was either Mr. Elliott or Mr. Orseck that is now stating to you the fact, as you set forth in that report the manner in which (730A) this accident is supposed to have occurred? A. To the very best of my recollection, sir, it would be Mr. Elliott that told me he was the superintendent of Public Works.

Q. The entire history could have been given to you by the attorney, Mr. Orseck, also; is that correct?

Ralph Peimer, for Plaintiffs, Cross

Mr. Edelman: I respectfully object as to what could have been done.

The Court: Overruled.

A. I normally don't accept attorneys'—

Mr. Sergi: I object to the answer as to what he normally does.

The Court: Strike out, "I normally don't accept attorneys'"—

The Witness: I don't—

The Court: Give us your best recollection.

The Witness: My best recollection is that Mr. Elliott gave me the information, the history.

(731) The Court: All of the history, including the way the accident happened?

The Witness: Yes, sir.

By Mr. Sergi:

Q. Now, Doctor, you have a nurse or a secretary in your office? A. Yes, sir.

Q. Now isn't it the nurse or secretary that obtains a history from the patients— A. No.

Q. Let me finish, Doctor.

(Continuing) —that come to your office before you examine them, isn't it a fact that your nurse or your secretary is the one that takes the history and then you examine after she has taken that information? A. May I answer, sir?

Q. That is my question, I stopped. A. The answer is no.

Q. No, you take it yourself? A. I take it myself, this is handwritten record, as you can see (indicating).

Q. Now, Doctor, do you take as much of a history as you think is necessary for your diagnosis? A. Yes.

(732) Q. Well, Doctor, if I ride in your car as a passenger, it is of no consequence to you if the light was red or green, is it?

Dr. Henry T. Gaynin, for Plaintiffs, Direct

The Court: Objection sustained.

Q. Now, did it make a whit of any consequence to you, Doctor, that this accident happened at about 11:30 a. m. in the morning? A. Not at the given moment, sometimes it does.

Q. In this case at the time it was given to you? A. In that case, no, it is purely extraneous in this particular case.

Q. You set it forth in your narrative report? A. Yes.

Q. Did it make any difference, Doctor, whether he was cleaning a storm drain or cleaning a sewer or cleaning anything at the time that he was struck; was that of any consequence to you? A. No, purely extraneous.

Q. But you put it in your narrative report? A. I put it in my records, too.

Q. Now, Doctor, where you set forth here that he struck by a 1 x 6 plank, are you certain that you got that from Mr. Elliott and not Mr. Orseck? A. I can't be 100 percent sure, but I would—to

• • •

(942) DR. HENRY T. GAYNIN, a witness called herein was sworn by the Clerk of the Court and testified as follows:

Direct Examination by Mr. Edelman:

• • •

(946) out what you could find out to see what you could do for this man? A. Yes.

Q. By whom was he referred to you? A. There were two sources, one is a Doctor Udinwald representing the City—

Q. The town? A. Yes, the township of Liberty. He asked me to examine this man and I had filed a compen-

Dr. Henry T. Gaynin, for Plaintiffs, Direct

sation report then and subsequently, apparently they came on their own.

Q. Doctor, was Udinwald an individual associated with the compensation matter on behalf of the town? A. Yes.

Q. He had asked you to examine this man? A. Yes.

Q. And give you an evaluation as an expert to him? A. Yes.

Q. Also to find out whether or not anything medically could be done to help him with his eye condition? A. That is correct.

Q. Doctor, what is the first time you saw Mr. Elliott? A. August 14, 1972.

(947) Q. August 14? A. 1972.

Q. '73. A. '72.

Q. Doctor, also did you operate on Mr. Elliott in the 91st Street Hospital with a doctor Schneider sometime in January of 1973? A. Correct.

Q. I show you this chart of the 91st Street Hospital which shows an admission date of 1/4/73 and discharge date of 1/29/73.

Is this a true and accurate copy of that hospital record? A. Yes.

Mr. Edelman: I offer it in evidence.

Mr. Serci: No objection except—

Mr. Bernhard: No objection.

The Court: It may be marked. The history is excised and not part of the exhibit.

The Clerk: So marked Plaintiff's Exhibit 18 in evidence.

Q. Doctor, on August 14, 1973, did you obtain a history from Mr. Elliott? A. Yes.

* * *

(949) version of how this accident happened. It is solely for the doctor's use in treating the patient. You have a right to know what he told the doctor for

Dr. Henry T. Gaynin, for Plaintiffs, Cross

the doctor's use in treatment and for no other reason.

All right, doctor.

A. He told me that on 4/24/73, while on a highway he was struck by a plank which fell from a truck.

Q. All right. What other history did you obtain from him as to what medical attention he received after being hit by this plank? A. He was taken to the Vassar Brothers Hospital.

Q. Doctor, can you please look at your report dated 10/13/72? A. Yes.

Q. Doctor, can you tell us what history you obtained as to, or rather the history that was given to you as to what treatment he received at that point after this occurrence? A. He was given emergency treatment by Doctor Cosentino in his office in Liberty, New York. The Community Hospital.

When the X-rays at Community Hospital revealed a fracture of the various parts of his head, he was then transferred to Vassar Hospital in Poughkeepsie, New York.

Q. Pardon me.
York.

* * *

(1007) *Cross Examination by Mr. Sergi:*

Q. Good afternoon, doctor.

Do you recall, doctor, in the very early part of your testimony sometime ago, Mr. Edelman asked you whether you took some history from the patient? Do you recall that? A. Yes.

Q. Now, you say you saw this patient for the first time on August 14, 1972? A. Yes.

Q. Now, when he came to your office did he come to your office alone or was he accompanied by someone? A. His wife.

Dr. Henry T. Gagnon, for Plaintiffs, Cross

Q. And the history that was given to you, was that given to you by his wife or by himself? A. You are asking for something I don't remember now.

Q. And was the history taken by yourself or by an assistant in the office? A. Well, the—my secretary types up a front of a card on which she puts certain pertinent data about the patient, address and age and all that, and then she asks a history just to put on the record. And then I supplement (1008) it by talking to the patient or whoever is with the patient.

Q. Sir, would you say that the history that you made in your report of 10/13/72, indicates all the history that you had obtained from Mr. Elliott? A. Yes.

Q. There is no other history? A. No, not at that time.

Q. Did you get further history later on? A. Well, I had a chance to look at records later on, much later on.

Q. I thought you testified to Mr. Edelman that you didn't obtain any further history? A. I'm talking in terms of my first report.

Q. Yes. A. But when I was given a record later on of the Vassar Hospital, that supplemented it.

Q. Doctor, I think we misunderstood each other.

I'm talking about the history regarding the accident. A. That's the only—

Q. Right? A. Right.

Q. So the only time you got history regarding the accident was on the very first visit on August 14, 1972? (1009)

A. Correct.

Q. And you indicated all of the history that you obtained on August 14, 1972, on your first report, doctor, of 10/13/72; is that correct? A. Yes.

Q. And you addressed that narrative report, "To whom it may concern"? A. Right.

Q. Doctor, you knew at that time that this letter "To whom it may concern," was going to the attorney for the plaintiff, either Mr. Orseck or Mr. Edelman; is that correct? A. Correct.

Dr. Henry T. Gaynin, for Plaintiffs, Cross

Q. Now, I think I heard you testify, and if I don't quote you correctly, please correct me—you stated that the history given to you by the patient was that on April 24th, while working, he was struck by a board which fell from a truck.

Was that your testimony earlier? A. Yes, right.

Q. Is that what you said? A. Right.

Q. Now, will you please look at your report of 10/13/72.

Mr. Sergi: Will you mark this, please, for (1010) identification.

The Clerk: Two-page document marked Defendant Maggiolo's Exhibit N for Identification.

(So marked.)

By Mr. Sergi:

Q. Would you now read the history which appears in your report, doctor? A. "I was given a history that on 4/24/72, while working for the Village of Woodridge, Sullivan County, New York, he was struck by a plank that was stored on a truck that passed on the highway."

Q. There is nothing in there, is there, doctor, about a board falling from a truck, is there? A. No.

Q. Where did you get that thought that you stated here in the Courtroom that that was the history that was given to you by Mr. Elliott, that a board fell off the truck, when in fact, in your report of 10/13/72, you don't state that a board fell off the truck?

Did one of the attorneys suggest it to you?

Mr. Edelman: I object.

The Court: Overruled. I will allow it.

A. No. The patient may have subsequently said something to me about that. I'm not sure.

(1011) Q. But you have no record of it anywhere? A. Not at that time, no.

Dr. Henry T. Gaynin, for Plaintiff, Cross

Q. At any time. A. Yes, later on I have—

Q. Show me where you have the later on? A. On the front page here. I later—I don't know when, but I have, "While on highway was struck by plank which fell from truck."

Q. Isn't it a fact, doctor—may I have that card, please?

A. Yes, surely.

Mr. Sergi: Can we mark this for identification?

The Clerk: Card marked Defendant's Exhibit—Maggiolo's Exhibit O for Identification.

(So marked.)

By Mr. Sergi:

Q. Doctor, reading from that card which is now Defendant's Exhibit O for Identification, do I state it correctly that the typed portion states, "While on highway was struck by plank from highway"? That's the typed portion, is that correct? A. Right.

Q. And now there is crossed out and in handwriting—do I read correctly now, that now in handwriting, "which (1012) fell from truck"? A. A truck. Correct.

Q. Now, when did you make that addition? A. I don't know. It must have been subsequent to my—

Q. Is that your handwriting? A. That's my handwriting.

Mr. Sergi: I offer that card in evidence, your Honor.

The Court: Any objection?

Mr. Edelman: Let me see it.

I certainly will join in the offer.

The Court: No. Whether you object to it or not.

Mr. Edelman: I have no objection to it.

The Court: Let it be marked.

The Clerk: Defendant Maggiolo's Exhibit O, previously marked for identification, now marked in evidence.

Dr. Henry T. Gaynin, for Plaintiffs, Cross

(So marked.)

Mr. Sergi: I will continue asking questions, your Honor, and may I hand this to the Jury while I'm asking questions?

The Court: Surely.

(1013) (Exhibit handed to Jury.)

By Mr. Sergi:

Q. Now, doctor, in obtaining the history, I think you testified that obtaining a history is important for your examination so you may perform diagnosis; is that correct, doctor? A. Yes.

Q. I assume that you are interested in knowing what kind of trauma there was; is that correct? A. Basically. The details may not be as important as what actually struck the man and with what force.

Q. So what you are interested in is whether he was struck—is that correct? A. Right.

Q. In what direction he was struck? A. Not necessarily. But with what force he was struck.

Q. And the force he was struck; okay. A. Right.

Q. So if I quote you correctly, you just want to know the force in which he was struck. A. Right.

Q. Nothing else is important? A. That's right.

(1014) Q. However, doctor, you set forth in your history here more than that. You state the date that it occurred—is that important? A. Yes.

Q. You state here he was working for the Village of Woodridge; was that important? A. In general terms, yes.

Q. Why is that important to your diagnosis? A. Well, problems may arise as to—as came out with respect to the compensation responsibility.

Q. Or liability, as you changed on the card?

Mr. Edelman: I object to that, your Honor.

The Court: Sustained. Argumentative.

Dr. Henry T. Gaynin, for Plaintiffs, Cross

Q. Did you make a change on your card which is now Maggiolo's Exhibit M, and strike out "compensation" and mark "liability"? A. I have to see. I probably did.

Q. May I borrow this a moment? Thank you.

At the top of the card, did you strike out "compensation" and write in "liability"? A. Right.

Mr. Sergi: May I now have my last question answered, your Honor?

The Witness: May I have the last question?

(1015) Mr. Sergi: In view of what I just indicated to the Court and Jury, may I now have my last question passed upon by the Court?

The Court: May I have the previous question?
(Record read.)

The Witness: Yes.

By Mr. Sergi:

Q. Would you answer it? A. I did.

Q. I want to know, doctor, you made this card originally when the patient came in for the first time?

The Court: The exhibit that is being passed is
—Exhibit O.

Mr. Sergi: I beg your pardon. "O".

Q. When the patient came in for the first time on—on 8/14/72, you saw the patient for the first time? A. Right.

Q. I assume, doctor, that at that time you made out this card, which is Defendant's Exhibit O; is that correct? A. Right.

Q. And you fed certain information to your secretary or receptionist and she did the typing? A. Right.

(1016) Q. Is that correct? A. Correct.

Q. Doctor, I now ask you when was the alteration or the change made on your card? A. I can't tell you the exact date. I would say at some subsequent date when

Dr. Henry T. Gaynin, for Plaintiffs, Cross

I knew that a report would be required on it, you see, and the reason for the change is that we have different files for compensation, private and for liability.

In order to have it at hand, if I get requests and all, I re-marked it—or my secretary actually re-marked it, and we filed it away in a different file.

Q. No argument about that. I just want to know, doctor, when and by whom were you advised, that this was now liability instead of compensation?

The Court: I think we have two questions.

Can you first tell us when; if you can't give us the exact month, try to relate it to an event?

The Witness: Yes. I'm trying to see if I have—on October 4, 1972, I received a letter from Mr. Orseck's office and it gave me the idea it was a liability.

Q. May I please— A. Yes.

(1017) The Court: Will you please mark this.

Mr. Sergi: May we have this marked for identification.

The Clerk: Two-page document marked Defendant Maggiolo's Exhibit P as in Peter, for Identification.

(So marked.)

By Mr. Sergi:

Q. This is the letter that you received from Mr. Orseck on October 14, 1972; is that correct? A. Correct.

Q. And in response to that letter, you marked your file accordingly, changing it from compensation to liability? A. Yes.

Mr. Sergi: I offer that letter in evidence, your Honor.

The Court: Any objection, Mr. Edelman?

Mr. Edelman: I don't know. Let me see it.

The Court: Show it to Mr. Edelman.

Dr. Henry T. Gaynin, for Plaintiffs, Cross

Mr. Edelman: No objection, your Honor.

The Court: Let it be marked.

The Clerk: Defendant Maggiolo's Exhibit P, previously marked for identification, now marked in evidence.

(So marked.)

(1018) By Mr. Sergi:

Q. After receiving this letter marked Defendant's Exhibit P for Identification, you then obtained the information from the letter sent to you by Mr. Orseck and incorporated it in your report of October 13, 1972; is that correct?

Mr. Edelman: I respectfully object.

The Court: May I have the question?

(Question read.)

The Witness: Well, no, because the history incorporated this report is not the same as my history.

Mr. Sergi: May I give this to the Jury, your Honor?

The Court: Do you want to read it to the Jury instead of having it circulated?

Mr. Sergi: Office of Or—Orseck Law Offices, dated October 4, 1972.

"Dr. Henry T. Gaynin, 200 West 58th Street, New York, New York, *Re*" Robert Elliott.

"Dear Doctor: The following is a resumé of the accident in which your patient Robert Elliott was involved. The accident happened on April 24, 1972, while he was in the employ of the Village of Woodridge, Sullivan County, New York.

(1019) "At the time of the accident he was standing on the road cleaning up a clogged drain, when a truck loaded with debris, boards and planks, came by. A plank or a board extending beyond the body of

Dr. Henry T. Gaynin, for Plaintiffs, Cross

the truck hit him in the face as the truck went by causing him to suffer serious head and facial injuries.

"Following the accident, he was taken to Dr. Cosentino's office in Woodridge * * * of the lip, face and below the eye were sutured. He was then taken to the emergency room of the Community General Hospital in Liberty, New York, where he was attended by Dr. Seymour Bessen of Liberty.

"Physical examination at that time revealed his lacerations were all sutured, upper and lower dentures broken and edema around the nose and mouth. X-rays of the skull, cervical spine, mandible and zygoma nose revealed a fracture of the nose, fracture of the floor of the left orbit and the fracture of the lateral wall of the maxillary sinus.

"His condition at that time was very grave and intensive care and attention by Dr. Bessen, he referred the patient to Vassar Hospital in Poughkeepsie, to the services of a plastic surgeon. I (1020) enclose herein a Xerox copy of the hospital record of the Maimonides Hospital.

"He was attended by various doctors to date. He suffers from a post traumatic syndrome, headaches, dizziness and nausea. He has recurring bouts of nasal congestion and nocturnal suffocation. I am advised that a Romberg test was positive, he suffers a right side weakness and apparently favors his right side taking short steps on his right foot. He suffers from a radiation of pain down his arm and down to his left thumb and left two fingers.

At the Vassar Hospital, surgery was performed to his eye. Before the surgery, he states that he had a blurred vision and was suffering from diplopia. After the surgery, he lost vision of the

Dr. Henry T. Gaynin, for Plaintiffs, Cross

left eye and hearing in his left ear. Among the doctors who saw him professionally and treated him were Dr. Ralph Pemier of 77 Park Avenue, New York, New York and Dr. Klafter, D.D.S., who is presently repairing his mouth and teeth.

"At the present time, it is quite obvious that he has virtually complete loss of vision out of the left eye and hearing out of the left ear. It is now six months since the accident and neither his (1021) sight nor his hearing has improved.

"I respectfully request that you prepare and mail to me a detailed report of the several examinations made by you, the treatment afforded by you, your diagnosis as well as prognosis.

"Please be good enough to comply with this request at the earliest possible moment.

"Respectfully yours, Sidney Orseek."

(Whereupon, Mr. Bernhard entered the courtroom.)

Cross Examination by Mr. Sergi: (Cont.)

Q. Doctor, you heard me read the history as Mr. Orseek gave it— A. Right.

Q. —in Exhibit P.

You say in your exhibit, which you added in handwriting "which fell from truck" the history as Mr. Orseek gave it, "A plank or board extended beyond the body of the truck, hit him in the face as the truck went by."

Where did you get the history that the board fell out of the truck? A. I must have gotten it on a subsequent time.

Q. From Mr. Orseek? A. No.

(1022) Q. Now, keeping in mind— A. Excuse me. In the Vassar Brothers Hospital—

Mr. Sergi: Objection.

Dr. Henry T. Gaynin, for Plaintiffs, Cross

Mr. Edelman: Your Honor, he should be—

Mr. Sergi: Your Honor, Vassar Brothers Hospital was excluded and I object to the doctor reading it.

The Court: Objection overruled if that's the basis of the objection.

Did you get it from the Vassar Brothers Hospital record?

The Witness: Yes. I see it now.

The Court: I'll take that as the answer.

The Witness: There it is.

The Court: Now, Mr. Edelman, I don't want any sign of confirmation by you. You are not a witness, you are the lawyer.

By Mr. Sergi:

Q. Well, now, Doctor, the letter that came to you from Mr. Orseck was dated October 4, 1972. Your report, your narrative report was dated October 13, 1972.

It was in response to the letter from Mr. Orseck; is that correct? A. Correct. And that had the history—

(1023) Q. Excuse me. A. I'm sorry. I'm trying to answer your question.

Q. Excuse me, Doctor, I'm asking the questions. If you want to ask a question, if the Court permits you to, I'll have no objection.

The Court: There is no question yet.

Q. At the time that Mr. Orseck sent you the letter, had you already indicated on your card the history that Mr. Elliott gave you when he first came to see you? A. In my letter is the history that was given by the patient. Or his wife. And/or his wife.

Q. Please bear with me, Doctor, I move a little slowly.

Your card and the typed portion was made out by you when— A. Not by me. It was made out by my secretary.

Dr. Henry T. Gagin, for Plaintiffs, Cross

Q. I'm sorry. Made out by your secretary with information provided by you— A. Not by me. As she is making out the card she says to the patient, "What happened?"

The patient says, the wife, here, "Well, I was on the highway, I was struck by a plank from the highway." And that's what she put down. Later on I asked—

Q. Excuse me, doctor— (1024) A. Will you let me finish, please. Then later on I asked a few more questions and with all the information at hand at that time, I wrote this.

Q. What was the information you had at hand at the time that Mr. Elliott came to your office? A. Whatever Mr. Elliott and his wife told me.

Q. What other information did you have, did you have the hospital record which was sent to you by Mr. Orseck with his letter of October 4th, 1972? A. No. At that time I didn't have that hospital record.

Q. Excuse me, at that time you didn't have the hospital record; is that right? A. The Vassar Brothers Hospital record.

Q. Which hospital record did you read from, the Vassar Hospital? A. Yes.

Q. Vassar Hospital? A. That's right.

Q. You didn't have that when you examined Mr. Elliott? A. Right.

Q. Is that right? A. Yes.

* * *

(1037) Mr. Sergi is using this for other purposes but that doesn't mean he can't cross examine on it.

I agree with you. I think he is trying to get opinions of doctors not here but I will charge the jury that the mere fact that Mr. Sergi says that there is an opinion that says "so and so and does that change your opinion" no way implies that that doctor did express that opinion. There is nothing in the record to support it. He may use it just

Dr. Henry T. Gaynin, for Plaintiffs, Re-direct

for cross examination but Mr. Sergi will not get that kind of advantage. I know he is misusing it.

Mr. Orseck: He can go on *ad infinitum*—

The Court: I sat Mr. Fetell down when he started objecting. One lawyer to a litigant and I have enough trouble with that.

Incidentally, Mr. Edelman, when I reprimanded you and when the doctor agreed, you just threw the paper down and looked at the jury as if to say, "See, I told you."

You look at a jury and get affirmations and confirmations and agreement from the jury.

I know some of it is part of you, and it started. I'm sure, when you began to practice law

* * *

(1053) *Re-direct Examination by Mr. Edelman:*

* * *

(1060) Mr. Sergi: He took—

The Court: Mr. Edelman, you asked questions that required the doctor to say where he got the information, that gave the plaintiffs the opportunity to show that he did give a history to Vassar Hospital, and then, of course, Mr. Edelman had to repeat it and ask if it was consistent. That came close to violating the edict of the Court. To the average lawyer, I would sit him down, but I expect less from Mr. Edelman. Then, when you asked a question, "Doctor, there are ophthalmologists, doctors, throughout the country?" Here's an expert. I don't know what he charges, but I hope he charges enough, and you have to ask him whether there are doctors throughout the country? I even know that, you know.

Mr. Sergi: Even the Judge knows that.

Dr. Seymour Bessen, for Plaintiffs, Cross

The Court: Thank you, Doctor. You're leaving the slides, and you're leaving the record, and Mr. Edelman will see they get back to you.

Are we ready now?

Mr. Sergi: I'll keep those.

Mr. Edelman: Wait a moment. I want them to be kept by the Court; they're too important.

The Court: We never keep records.

• • •

(1063) SEYMOUR BESSEN, called as a witness, first being duly sworn, testified as follows:

Mr. Edelman: Pardon me. I think the Doctor has a hospital record. May I see if I can get it?

The Court: Do you have a copy of the Community Hospital record in Liberty, Mr. Sergi? Do you have a copy of that record?

The Clerk: Plaintiffs' Exhibit 8.

Mr. Sergi: Do you want my copy?

The Court: Your copy?

Mr. Orseck: I think he took the one that was in evidence, Judge. I believe the doctor may have inadvertently taken it.

The Court: All right, he has it.

Mr. Edelman: Your Honor, I do not have at the (1064) moment the hospital record of the Community Hospital, but I have another photostat of it, and for the purposes of this examination, so we don't hold it up, may I have it marked, just for identification?

Mr. Sergi: Let me see it.

The Court: Where is the exhibit?

Mr. Sergi: No objection.

The Court: Let it be marked for identification, cross-indexed to Exhibit No. 8.

The Clerk: So marked, Plaintiffs' Exhibit 8.

Dr. Seymour Bessen, for Plaintiffs, Direct

(So marked)

The Court: You agree it is the same as Exhibit 8 that has temporarily been mislaid?

Mr. Sergi: Yes.

Direct Examination by Mr. Edelman:

Q. Is that in your handwriting? A. Yes.

Q. Doctor, are you a physician and surgeon duly licensed to practice medicine in the State of New York? A. Yes, sir, I am.

Q. Would you please be good enough to tell this Court and jury your education and qualifications? A. I graduated the Chicago Medical School in 1951. (1065) I interned at Queens General Hospital in Jamaica and I spent five years as resident in general surgery at the Veterans Hospital in Brooklyn, Fort Hamilton.

In 1957 I went up to Sullivan County, and I have been practicing there since.

I am chief of surgery at the Community General Hospital, at the Liberty Loomis Hospital.

Q. The first hospital? A. Community General Hospital in Sullivan County.

Q. And the Loomis Hospital? A. Yes, sir.

Q. Is that the highest staff surgeon at that hospital? A. Yes, sir.

Q. Does that surgery include traumatic surgery? A. Yes, sir.

Q. Did there come a time when Robert Elliott came under your care and attention? A. Yes, sir, it was.

Q. When was the first time you saw Robert Elliott, or Bob Elliott? A. On April 24, 1972.

Q. Where did you see him? A. I saw him in the emergency room at the Community (1066) General Hospital.

Q. Were you the doctor who took care of him in the emergency room at Community General Hospital at about one o'clock on April 24, 1972? A. Yes, sir, I was.

Dr. Seymour Bessen, for Plaintiffs, Direct

Q. At that particular time did you take a history? A. Yes, sir, I did.

Q. Was it necessary for you to take a history in order to come to a determination both as to a diagnosis or as to treatment? A. Yes, it was.

Q. And who gave you that history? A. The history was given to me by Mr. Elliott and by his wife.

Q. And did you place that history down on the hospital record itself? A. Yes, sir; it's placed here on the record.

Q. Could you please tell us what the history was?

Mr. Sergi: Objection.

The Court: Overruled; I will allow it.

A. The history was that he was working at the side of the road. There was some urban renewal work going on in Woodridge and there was a truck with debris that passed, a board fell from the truck and hit him and he was struck by (1067) this board on the side of his face—

Mr. Sergi: Are you reading from the hospital record?

The Witness: No, I am telling him as he asked me to.

The Court: Don't answer Mr. Sergi.

The Witness: Excuse me.

The Court: He has a right to object and nothing more.

Mr. Sergi: Objection, your Honor.

The Court: Overruled. Continue.

A. I am continuing—

Q. Hold it, Doctor. Did you place that history on a personal report of yours? A. I placed the history on a report, yes, sir, I did.

Q. Was a copy of that report sometime later given to Mr. Orseck? A. Yes, it was.

Q. What is the date of that report? A. September 11, 1972.

Q. On the hospital record itself, could you please tell this Court and jury what you as the time of this occur-

Dr. Seymour Bessen, for Plaintiffs, Direct

rence—pardon me, what you placed on April 24, (1068) 1972. A. I saw Mr. Elliott in the emergency room. He had been injured by this board. He had an injury to the left side of his face.

Examination, including X-rays, showed that he had a fracture of the nose; he had a fracture of the left orbit—that's on this side—the lower part of the rim of the eye socket. He also had a fracture of the mandible—not the mandible, he had a fracture of the maxilla, or the cheekbone, and he complained of double vision.

Lacerations were already sutured by Dr. Cosentino of Woodbridge.

Q. Did you place down the time of the happening of the occurrence on your hospital record? A. Yes, it happened at 11:30 a. m.

Q. Did you place the mechanism of the accident on that hospital record? A. Yes.

Q. What did you place on the hospital record on the day of this occurrence at about one o'clock in the afternoon?

Mr. Sergi: Objection.

The Court: Objection sustained.

Q. What does the hospital record state?

(1069) The Court: Objection sustained.

Q. All right. Is the history that is in that hospital record in your handwriting? A. The diagnosis portion is in my handwriting, and my signature here. This history was written by the nurse.

Q. All right. In the history does it state the manner in which this—

The Court: Objection sustained. Don't ask that question again, Mr. Edelman. I ruled on this a number of times.

Q. Doctor, what treatment did you render to Mr. Elliott?

A. The lacerations were already sutured, so I did not do

Dr. Seymour Bessen, for Plaintiffs, Direct

that. I did have him given—I had X-rays taken, and after seeing all the X-rays I made the arrangements for him to be transferred to Vassar Brothers Hospital in Poughkeepsie, under the care of Dr. MacDowell and Scilleppi.

Q. Why was it necessary to transfer from your hospital, Community General Hospital, where you were chief of surgery, to the Vassar Hospital?

Mr. Sergi: Objection.

The Court: Sustained as to form.

Q. Did you think it was medically necessary for you to transfer from your hospital to the Vassar Brothers (1070) Hospital in Poughkeepsie? A. Yes, sir, I did.

Q. And what was the reason for that? A. Well, he needed a reconstruction of the face, the bones of the face, and I felt this was beyond what I would like to do. I have done it, but I just felt that this particular injury was too severe, and I referred him to a maxillofacial surgeon.

Q. Doctor, did you have an opportunity to see this man again, after he was transferred? A. Yes, sir, I did.

Q. Could you tell us, at that time did you take a history at that time, a medical history, when you saw him the next time? A. Yes, I did.

Q. Could you tell us what the date of your next examination was, the next visit? A. I saw him again on 6/14/72.

Q. Could you tell us what he was suffering from at that time? A. At that time he complained that he had headaches.

Q. Did he make any complaints or any indication of any loss of hearing or loss of sight? (1071) A. Yes.

Mr. Sergi: Objection.

The Court: Let the doctor testify.

Mr. Sergi: He is leading.

Dr. Seymour Bessen, for Plaintiffs, Direct

The Court: Overruled. I will allow it. Leading questions are not objectionable, only when they are prejudicial, and I see no prejudice in these questions.

A. He also complained of loss of hearing as well as the loss of vision on the left side.

Q. As the result of these complaints, did you refer him to any other doctors or any other specialists? A. He informed me that he was going to see other doctors, and I suggested that I would re-evaluate his entire condition after I had all the reports.

Q. Did the severity of the complaints have anything to do with your referral? A. My original referral to the Vassar—maxillofacial surgeon in Vassar Hospital, yes.

Q. How about the complaints of loss of hearing and loss of sight? A. I did not refer him to anyone because he told me that he was—that he already had made arrangements to see specialists in those particular fields.

(1072) Q. In your opinion, with reasonable medical certainty, was it necessary for him to be seen by competent ENT men and competent eye men in order to have proper evaluation and treatment for those conditions? A. Yes, sir.

Mr. Edelman: Thank you ever so much. You may inquire.

Just one other thing, Doctor:

Q. Doctor, you know Mr. Orseck, don't you? A. Yes, sir, I do.

Q. You both come from the same community up in Liberty, New York? A. Yes, we do.

Mr. Edelman: Thank you.

Dr. Seymour Bessen, for Plaintiffs, Cross

Cross Examination by Mr. Sergi:

Q. You had seen Mr. Orseck before you saw Mr. Elliott, I would assume; is that right, Doctor? A. I have known Mr. Orseck for a number of years, yes, sir.

Mr. Sergi: Do you have the compensation folder?
Mr. Orseck: I gave it to you.

Q. Doctor, had you known Mr. Elliott before you (1073) saw him on that occasion? A. No, sir, I did not know Mr. Elliott before that.

Q. Did you know Mrs. Elliott before the first time you saw Mr. Elliott? A. Yes, sir; I did.

Q. Was she a nurse working at that hospital? A. Yes, sir; she is—she was.

Q. She was at that time? A. Yes, sir; she was.

Q. And that's when Mr. Elliott was brought in? A. Yes, sir.

Q. She had been there prior to that date, also? A. That is correct.

Q. Now, when Mr. Elliott was brought into the hospital she was present; is that correct? A. That is correct.

Q. You say that the history was given to you partially by Mr. Elliott and partially by Mrs. Elliott; is that what you said? A. Yes, sir; I did say that.

Q. What part of the history was given to you by Mrs. Elliott? A. I can't recall.

(1074) Q. And what part was given to you by Mr. Elliott? A. I can't recall.

Q. So that you don't know whether all of the history was given to you by Mrs. Elliott, whether all of the history was given to you by Mr. Elliott?

Mr. Edelman: I respectfully object.

The Court: Overruled. I will allow it.

Dr. Seymour Bessen, for Plaintiffs, Cross

A. When I asked him what happened, they both contributed in giving me the history.

Q. I want to know what part did Mrs. Elliott contribute. A. I don't recall.

The Court: Do you recall whether Mr. Elliott was responsive in answering questions concerning history?

The Witness: Yes, sir, he did tell me what happened.

* * *

(1077) the nurse heard at the same time that I heard it, although some of it is the same history, may have been told before I got there. But that I cannot account for.

The only thing I know is that what is here is the history that was given to me which the nurse wrote down.

Q. What do you say the history was that the nurse wrote down. A. That while at work he was struck in his face by a board.

Q. Period? A. That is correct.

Q. What was it that you read before when Mr. Edelman asked you about the history you got at the hospital?

A. Well, this is the history that I obtained.

Q. Just a minute, Doctor. The history you obtained at the time the patient was in the hospital, or the history you obtained later? A. This is the history that I obtained at the time in the hospital.

Q. Now, at the hospital when you obtained the history, would you enter the history that you were told into the hospital record, or would you keep same, and later put it into the report?

* * *

Irvin Newmark, for Defendant Maggiolo, Direct

(1119) IRVIN NEWMARK, called as a witness, having previously been duly sworn, resumed the stand and testified as follows:

The Court: You may proceed, Mr. Sergi.

Direct Examination by Mr. Sergi:

* * *

(1123) A. Right here (indicating).

Q. You have put in a square, and you have written the word Slater over the square? A. Yes.

Q. Now, on April 24, 1972 was there any urban renewal work going on in the village of Woodbridge? A. Yes, there was demolition project going on.

Q. Specifically—

Mr. Sergi: Withdrawn.

Q. Was there more than one urban renewal site or one in the town? A. There were several.

Q. Now, specifically on April 24, 1972 can you locate for us where the demolition site was located?

Mr. Edelman: Well, he said several. So it should be plural, your Honor.

Mr. Sergi: Withdrawn.

Q. Where was the work being done on April 24, 1972?

A. There was one place here right on Highland Avenue.

Mr. Edelman: Your Honor, may we have—

Mr. Sergi: Just a minute, Mr. Edelman. I will conduct my examination.

* * *

(1130) A. He had been made a supervisor on the street and sanitation department.

Q. Would he be under your supervision? A. Well, technically he would still have been under my supervision.

Irvin Newmark, for Defendant Maggiolo, Direct

Q. And do you have specific recollection as to what you and/or Mr. Elliott were doing on April 24, 1972? A. Well, it was a Monday and I think he was out cleaning mud and sand that had washed off the demolition lots onto the street.

Q. Do you know where he was working during that? A. No.

Q. By the way, what time do you start doing work in the morning? A. 7:00 o'clock.

Q. Does the entire crew congregate at a particular place before they go to work or do they go to the job? A. No, everybody meets at the village garage.

Q. Did you meet with Mr. Elliott that morning at the village garage? A. Yes.

Q. Did he receive instructions from you or did he make the decision to go somewhere and shovel the street? A. No, the decision was his.

* * *

(1136) Q. Nevertheless was it before you met Mr. Elliott that day? A. Yes.

Q. Now, when you were at the job site that morning will you tell this judge and jury what you observed the Maggiolo doing? A. There were a series of dump trucks and their front end loader, and were loading gravel onto to the dump trucks. When I say gravel I mean dirt, and that was on there.

Q. Dirt, rocks, small stones? A. Small stuff.

Q. Sand? A. Sand. Mainly sand.

Q. And in the job site where they were working, where you observed them approximately 10 o'clock in the morning on April 24, 1970, where there any buildings or the remains or any building that had been recently demolished? A. Yes, right in this area here there had been a building that they demolished (indicating.)

* * *

Irvin Newmark, for Defendant Maggiolo, Direct

(1156) Q. All right.

After you made this observation—withdrawn.

Now, as part of your job as superintendent of the Village of Woodridge, was it also part of your duty to conduct an official investigation on behalf of the village regarding any accidents or injuries that occurred to any of the employees of the village? A. Yes, it was.

Q. Now, did you then conduct some kind of an investigation? A. I went up to where I was told the site of the accident was.

Q. Where was that? A. In front of Frieda's Bungalows.

Q. Okay.

Now, were you alone or with anyone? A. No, I went in the police car with the chief of police.

Q. And when you arrived there at Slater's Garage, did you look for Mr. Elliott? A. Well, I was told what happened to Mr. Elliott.

Q. You were advised that he was not there? A. Right.

Q. Were you advised that he had already gone to the hospital? (1156a) A. Right.

(1157) *Direct Examination by Mr. Sergi: (Cont.)*

Q. Now, when you got to Frieda's Bungalow, did you meet anybody at Frieda's bungalow? A. Mr. Shack was there.

Q. Mr. Joseph Shack? A. Outside in the yard, yes.

Q. Joseph Shack, he's the owner and the operator of Frieda's Bungalow? A. Yes.

Q. Had you known Mr. Shack before April 24, 1972? A. Yes.

Q. Had he been in this village a long time? A. He was there when I came, so I imagine he was there a long time.

Q. Did you have any conversation with Mr. Shack yourself? A. Yes.

Irvin Newmark, for Defendant Maggiolo, Direct

Q. When you got to Frieda's Bungalow, where did you go, specifically? A. We stopped on the street in front of Frieda's Bungalow.

Q. You stopped on the street in front of Frieda's Bungalow. Were you looking for anything? (1158) A. Yes.

Q. What were you looking for? A. I had been told that a board—

Q. Don't tell us what you were told. A. I was looking for a board.

The Court: Do you have objection to that, Mr. Edelman?

Mr. Edelman: I withdraw the objection.

The Court: Go ahead.

Q. You were looking for a board—

Mr. Edelman: Pardon me, your Honor, I withdrew my objection.

The Court: You now make the objection?

Mr. Edelman: I withdrew my objection. He was saying he was told something.

The Court: Go ahead.

Q. Don't tell us what you were told. Tell us what you were doing. You were looking for a board? A. Yes.

Q. Where were you looking for a board? A. Anywhere in the general area on the street, which would be in this area here.

Q. On Glenwild Road? A. Yes.

* * *

(1216) "19. Name and address of physician: Dr. Immerman.

"20. Name and address of hospital: Liberty Maimonides.

"22. (a) Has employee returned to work: No.

"24. (a) What was employee doing when accident occurred: Trying to pry loose branch caught

Irvin Newmark, for Defendant Maggiolo, Cross

between dump truck and body of truck; (b) Where did accident occur: Back yard of Frieda's Bungalow.

"25. How was accident or occupational disease sustained: Struck by branch.

"26. (b) If mechanical apparatus or vehicle, what part of it: truck body—(dump).

"Firm name: Village of Woodridge.

"Signed by: Irvin Newmark."

This was received by the compensation board, Sullivan County, April 27, 1972.

Direct Examination by Mr. Sergi: (continuing)

Q. Did you ever see Mr. Elliott after that, Mr. Newmark? A. Yes.

* * *

(1236) *Cross Examination by Mr. Edelman:*

* * *

(1256) Mr. Edelman: All right.

Voir Dire Examination by Mr. Edelman:

Q. On the day of this occurrence, and the day before the occurrence, and a few days before that, when you were working in the town, you saw these trucks being loaded; is that correct? A. Yes, sir.

Q. All right.

The Court: Loaded with debris, we are not talking about sand or fill.

Mr. Edelman: No, no, loaded with debris which was going to be used.

Irvin Newmark, for Defendant Maggiolo, Cross

Q. Now, and was this—

Mr. Sergi: Do you want to ask him that, first?

The Court: That is the first questions, that is right.

Mr. Edelman: What?

Mr. Sergi: Ask him what is the custom and practice first.

The Court: Was there a custom and practice indulged in by Maggiolo wherein they overloaded the trucks?

The Witness: They loaded as much on the trucks as they possibly could get on.

The Court: Well, did they load it above the (1257) sideboards of the box of the truck?

The Witness: From the nature of the material, broken pieces of wood, some pieces would have to stick up above the sides of the truck.

The Court: All right.

Mr. Edelman: All right.

Mr. Sergi: If your Honor pleases, just—

The Court: What?

Mr. Sergi: My objection is that this is not the condition complained of by this witness as it was on the morning or the day of this accident—

Mr. Edelman: Just a minute.

Your Honor, if we are going to have any argument—

Mr. Sergi: Let me finish.

Mr. Edelman: If we are going to have argument, I respectfully ask that the witness leave the room.

I don't want any telegraphed answers.

Mr. Sergi: Look who is talking.

The Court: 95 percent of your questions, Mr. Edelman, were leading questions, as a matter of fact, many of them sounded like summations, the entire argument.

Irvin Newmark, for Defendant Maggiolo, Cross

I overrule the objection, because leading questions, I find, shorten the trial, but it hasn't worked this way in this case, of course, so when you are talking about

* * *

(1416) Q. Was that on the right side? A. Yes, on the right side.

Q. And how far up did you look for the broken branch? A. I looked up and I saw where a branch had been broken off, and I stopped looking.

Q. How high did you look? A. I looked up as high as I could see.

Q. How high would that be, roughly? A. Oh, to the top of the tree.

Q. Twenty feet, thirty feet, forty feet? A. Thirty feet or forty feet.

Q. And you checked—you are telling this jury that you checked this thirty or forty feet to see if there is a broken branch there; is that what you are telling this jury? A. I looked to see if I could see any broken branches.

Q. And somewhere up there you found evidence of a broken branch; is that right? A. Yes.

Q. And then you also looked at another tree; is that right? A. Yes.

* * *

(1430) Q. And those branches would have nothing to do with blood, is that correct? A. Right.

Q. And the difference in color, whatever you saw, was not wet, it was dry, is that right, sir? A. I didn't touch it. It didn't look wet.

Q. And it looked dry? A. It didn't look wet. I don't know if it was dry or not.

Q. Now, to come back to this—the compensation report. May I see the compensation report that is in evidence?

By the way, you stated that it was part of your duty to make a report of the accident, is that correct? A. Yes.

Irvin Newmark, for Defendant Maggiolo, Cross

Q. Did you ever make any written report of this accident? A. Yes.

Q. All right. Have you got a copy of that written report? I am referring to what you—I'll withdraw it.

In addition to the compensation report, did you ever make any other written report? A. I made some notes in a book that I keep.

(1431) Q. Have you got those notes with you? A. I believe Mr. Fetell has them, he has my book.

The Court: Will you please mark it.

The Clerk: Book marked Plaintiff's Exhibit 31 for identification.

(So marked)

Mr. Edelman: Your Honor, may I have a few minutes to look at this? May the jury be excused?

The Court: We will take a recess. Take five or ten minutes.

(Jury excused)

The Court: You have the Police Chief here, I understand.

Mr. Fetell: No.

The Court: Who else do you have?

Mr. Fetell: Four live witnesses and the deposition. They'll not take long on direct.

The Court: How much longer do you expect to be with this witness, Mr. Edelman?

Mr. Edelman: About five minutes, your Honor.

(Recess)

Irvin Newmark, for Defendant Maggiolo, Re-cross

(1432) (The following occurred in the absence of the jury.)

The Court: Are you finally ready? Can we proceed with this case? Let's go.

You know, I have other work to do, Mr. Edelman. I have other cases to try. This isn't the only case I have for the rest of my life. Let's get on with it.

I thought I had problems in criminal trials. This is impossible.

I should have tried liability alone. That would have done it.

Mr. Sergi: That's why I suggested it.

The Court: I thought it was a little unfair, but it is difficult to be fair with you, Mr. Edelman.

Mr. Edelman: Your Honor, may I approach the witness while I ask questions from this (indicating)?

The Court: Surely, but make sure you face the witness and not the jury.

Mr. Edelman: I will.

(Jury present.)

Re-cross Examination by Mr. Edelman (Continued):

Q. By the way, this book, Plaintiff's Exhibit 31 (1433) for identification, you wrote in this book in your own handwriting; did you not? A. Yes.

Q. And you wrote this on the day of the accident; is that right? A. Yes.

Q. Is that correct?

Did you ever tell anybody that Bob—

Mr. Sergi: May I read over your shoulder, please? I don't have a copy.

Mr. Edelman: Sure, sure.

Irvin Newmark, for Defendant Maggiolo, Re-cross

Q. That—pardon me.

Did you ever tell anybody that you saw him, Bob, heading up Glenwild Road with a big truck? A. Yes, I may have.

Q. All right.

Mr. Edelman: May I go up to the front, your Honor, for this thing?

Q. Did you specifically write in your—in this book, in your own handwriting as follows: "Bob"—no. Pardon me.

"I saw him heading up Glenwild Road with a big truck. Ten minutes later he was at Slater's, all blood on his face. Bob Slater took to Immerman's office, got (1434) Ralph, went up Glenwild Road. Bob said a board fell off one of Maggiolo's trucks and hit him while cleaning a catch basin."

Did you write that in your own handwriting?

The Court: Face the witness, Mr. Edelman. I'm not going to tell you that again.

Mr. Edelman: All right.

Q. Did you?

The Court: Wait.

Mr. Edelman: I'm sorry.

The Court: When a lawyer is on cross examination he should be directing the questions to the witness. He should not be making speeches to the jury. It is improper.

I have warned Mr. Edelman any number of times on that and I won't tolerate it any more.

Mr. Edelman: May I have the question read?

The Court: Yes.

(Record read.)

A. (Continuing) Yes.

Irvin Newmark, for Defendant Maggiolo, Re-cross

Q. All right. Did you ever tell that to Mr. Sergi or any of the investigators? A. I don't understand the question. Did I ever tell—

Q. Did you ever tell Mr. Sergi or Mr. Fetell or (1435) any of the three investigators that saw you that Bob said a board fell off one of Maggiolo's trucks and hit him while cleaning a catch basin? A. No.

Q. Did you show this book to the investigator? A. No.

Q. Did you ever show this book to Mr. Fetell? A. No.

Q. Did you show the—did you show Mr. Fetell that you wrote in your own handwriting Bob said a board fell off one of Maggiolo's trucks and hit him while cleaning a catch basin? A. Yes.

Q. Did you ever put in your—in this compensation form, Defendant's T in evidence, one single solitary word what Bob said as it appears in your report? A. No.

Q. You are aware, Mr. Newmark, that the County of Sullivan was a self-insuring compensation?

Mr. Sergi: Objection.

Q. Or rather—I'll withdraw that.

Were you aware, were you not, that the town—the village of Woodridge, as far as compensation cases, was a self-insurer?

* * *

(1438) lunch hour or when he was delivering gravel to Frieda's Bungalow Colony, he wouldn't be entitled to any compensation, is that correct, according to your understanding? A. No, I can't say that.

Q. As a matter of fact, hasn't there—I'll withdraw that.

As far as you knew, Bob Elliott, was he always an honest and hard-working individual? A. Hard-working; honest, I can't say.

Irvin Newmark, for Defendant Maggiolo, Cross

Q. All right. Isn't it a fact you and Bob had many battles or disputes or arguments? A. No, I wouldn't say "many."

Q. All right. But you had some; is that correct? A. Yes, a few.

(1439) *Cross Examination by Mr. Edelman: (Cont'd.)*

Q. Isn't it a fact that you dislike Bob Elliott and you disliked him during the time he was working under you—in your department? A. No.

Q. Isn't it a fact that from to time you've expressed dislike of him by speaking to some of your superiors, like either the town supervisor or the—pardon me—the town administrator? A. No.

Q. Who was the town administrator at that time? A. At the time of the accident? I think it was Dan Geller.

Q. Haven't you spoken to Dan Geller and told him on many occasions or on occasion the fact that you disliked Bob Elliott? A. No.

Q. Did you complain to Dan Geller about Bob Elliott? A. On certain occasions, yes.

Q. And that carried over to the day of this accident, isn't that so? A. No.

(1440) Mr. Sergi: What carried over? Objection to the form of the question.

The Court: Sustained as to form.

Q. All right. Bob Elliott was hurt on April 24, 1972, is that correct? A. Yes.

Q. And you knew he was seriously hurt, is that right? A. I had heard that he was seriously hurt.

Q. And you saw evidence of that with all the blood that you have described, is that right? A. Yes.

Irvin Newmark, for Defendant Maggiolo, Cross

Mr. Sergi: Objection, your Honor. This is all summation. Objection to the form.

The Court: All right. Overruled.

Get to the question you want to ask this witness, Mr. Edelman.

Q. After this accident, did you ever go to the—to any of the hospitals that Bob Elliott was at? A. No.

Q. Did you ever go to Bob Elliott's home to find out whether he was alive or dead? A. No.

Q. Did you ever call up Bob Elliott's home and (1441) speak to his wife or any other member of the family to find out the condition of one of your employees? A. No.

Q. All right. Did you make any inquiry at all of whatever happened to him? A. Yes.

Q. All right. And that was sometimes when, in 1973? A. No.

Q. All right. Incidentally, did you ever visit Bob Elliott at his home? A. The only recollection I have of that is, I think I passed by there and I spoke to him for a minute on the side of the road. He was standing by the road.

Q. When was that?

The Court: Got any idea when it was?

Q. Do you know whether it was a week, a month, five years, three years? Have you any idea? A. No, I have no idea.

Q. That was the only inquiry you ever made as to the health or condition of Bob Elliott from the time this accident to this present date, is that correct?

Mr. Sergi: Objection to the form of the question.

• • •

Irvin Newmark, for Defendant Maggiolo, Re-direct

(1442) *Re-direct Examination by Mr. Sergi:*

* * *

(1447) Mr. Sergi: I'm not offering it. I'm doing the same thing that Mr. Edelman was reading.

The Court: You may not read from a matter that is not in evidence. There is a way of doing it. But this is not the way.

By Mr. Sergi:

Q. Were you advised or did you know that Mr. Elliott was at Maggiolo's working site at 12:00 o'clock noon?

Mr. Edelman: I object.

The Court: Sustained.

A. I was told—

Q. By the way, Mr. Newmark, how many places was the Maggiolo crew working at on April 24, 1972?

Mr. Edelman: I respectfully object to it.

The Court: Overruled. I'll allow it.

A. I only saw them on that one lot, where they were taking fill out that day.

Q. And as far as you know, were they working at just one lot? A. That was as far as I know.

The Court: Did you visit other sites?

(1448) A. In the course of my duties, I was all over the village and—

The Court: All the other sites?

The Witness: Yes. And I don't recall seeing them anyplace else.

The Court: You don't recall any activity at any other spot except the location just located?

The Witness: No. I should say that—the fill that was being loaded there was being taken in dump trucks and deposited at some of these other sites. That's what—

Irvin Newmark, for Defendant Maggiolo, Re-direct

The Court: That was the only activity you witnessed that day?

The Witness: Yes.

Q. At any of the other sites, while you were cruising around as you say, did you observe any demolition going on at any of those sites that morning? A. No.

Mr. Edelman: I respectfully—

The Court: On what ground, Mr. Edelman?

Mr. Edelman: Because this is directly contrary to what he testified.

Mr. Sergi: Oh, God, what does—

The Court: Strike that. This is Mr. Edelman's (1449) version, his recollection of this witness' testimony.

It is your recollection that counts. And the statement is improper. If he wanted to make a statement he was advised to ask that the jury be excused and then make the argument.

Go ahead, Mr. Sergi.

By Mr. Sergi:

Q. When you made out this compensation form, Defendant's Exhibit 1, did you believe Bob Slater's version about how Mr. Elliott was hurt?

Mr. Edelman: Respectfully object to it. What his belief is.

The Court: What was that last remark of Mr. Edelman's?

(Record read.)

Mr. Edelman: Was.

The Court: Sustained only as to form.

By Mr. Sergi:

Q. The information that you put in the compensation form, as you described the accident, was as a result of what somebody told you?

Irvin Newmark, for Defendant Maggiolo, Re-direct

Mr. Edelman: Respectfully object.

The Court: Overruled.

A. No.

* * *

(1452) Mr. Sergi: May I have the last comment, please, of the Court, please, the last—

(The Reporter repeated Judge Mishler's comment.)

By Mr. Sergi:

Q. Why, why did you make these entries in the Compensation Form?

Mr. Edelman: I respectfully object to it.

The Court: Sustained.

Q. The entries you did make, they were based on your investigation; isn't that right? A. Yes, that is correct.

Q. Did Mr. Elliott personally ever approach you and explain to you how this accident happened? A. Never.

Q. Was there any ill feeling between you and Mr. Elliott? A. There may have been some.

Q. Why? A. Well, it is—It's difficult to explain.

Q. Well, explain it the best way you can. A. I would—I would from time to time try to offer him suggestions, and I suppose he resented me giving him any suggestions.

Q. He resented your being his superior in the work—

(1453) Mr. Edelman: I object to this, your Honor, as leading.

The Court: Sustained, that calls for a conclusion.

Were there any specific arguments, fights between you and Mr. Elliott?

A. Nothing that I—that I—

The Court: Nothing physical?

Irvin Newmark, for Defendant Maggiolo, Re-direct

The Witness: No, no, no, definitely.

The Court: The usual argument between a boss and somebody lower in the level of service?

The Witness: I would say so, yes.

The Court: You didn't like what he was doing, and he didn't like your orders; is that about it?

The Witness: Yes.

The Court: All right.

You don't say that you were right or that he was right, do you?

The Witness: No.

The Court: It was just a thing that may happen—

The Witness: It is an opinion.

By Mr. Sergi:

Q. Did that have anything to do with the manner in which you filled out that Compensation Form? (1454)

A. No, not at all.

Q. Did you know me, or—Withdrawn.

Did my office or anyone from my client come to you and talk to you before you made out that Compensation Form back in April of 1972? A. No.

The Court: Do you know any of the Maggiolo personnel?

The Witness: No.

Q. Did you socialize with any of the Maggiolo crew?

A. I did, I had known one of the employees, I seen him, I have been at his house one time in Livingston Manor, many years before, I didn't even know where he worked or what he did.

Q. Did you discuss this accident with them before you made out the Compensation Form? A. No, no, no, I didn't see them.

The time that I saw him was before I was employed by the village.

Joseph Diaco, for Defendant Maggiolo, Direct

Q. I show you Defendant's Exhibit V, a picture of the driveway of Frieda's Bungalow. A. Yes, sir.

Q. Is there a fence there? A. Yes.

• • •

(1470) JOSEPH DIACO, called as a witness on behalf of the defendant Maggiolo Contracting, having been duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Sergi:

• • •

(1475) Q. Which one was working at the dump site? A. The D-5 dozer.

Q. What was the dozer doing in the dump site? A. Knocking down the material from the truck that was piled up so that it would make it flat.

Q. Leveling it out? A. Leveling it out.

Q. What was the front end loader doing? A. Knocking down the buildings and loading it into the trucks.

Mr. Edelman: I can't hear.

The Witness: Knocking down the buildings and loading it into the trucks.

The Court: Mr. Edelman, will you please take a seat, if you can't hear, please move that temporarily, move it out of the way.

Mr. Edelman: Thank you.

(Mr. Edelman then took a seat at defense counsel's table.)

Mr. Edelman: Your Honor, may I just have the last question and answer?

(The reporter repeated the question and answer.)

• • •

Joseph Diaco, for Defendant Maggiolo, Direct

(1483) Q. You had one other man? A. Pight.

Q. He was a laborer? A. Right.

Q. What would he do? A. Well, he was following the trucks going up and down Glenwild Road, in case a board or a piece of wire or something like that would fall off the truck. He would be behind to pick it up and throw it into his pickup truck.

Q. Now, at all the times that you people were working in the Village of Woodridge, up to April 22nd—24th, 1972, were—was there any—ever any complaints that anyone had been hit by anything falling off any of your trucks? A. No.

Q. Was there any complaints ever made about the manner in which the trucks were being loaded? A. No.

Q. Now, while you were there, did you know Mr. Newmark? A. Yes, I made—met him occasionally.

Q. The man that was here testifying before? A. Yes, I met him before.

Q. Had you seen him at Woodridge?

• • •

(1489) A. Yes, definite.

Q. Where were they going? A. They were going to every job site, every foundation. A lot of times I had to jump up to show them exactly where I wanted it to be done.

Q. Do you know what each and every truck was carrying that day up until 12 o'clock? A. Yes.

Q. What? A. Bank run gravel.

Q. At any time, at any time, sir, at any time that morning, from 8 o'clock until 12, 12:30, until 12:30, that day, was anyone of your—Maggiolo trucks carrying anything but sand and gravel? A. No.

Q. At any time from 8 o'clock in the morning on April 24, 1972 through 12:30, were any of your trucks down Glenwild Road? A. No.

Joseph Diaco, for Defendant Maggiolo, Direct

Q. When did you for the first time carry any debris on April 24, 1972? A. About 2 o'clock in the afternoon. Approximately.

Q. Are there time sheets for each truck that is being used? (14. A. Yes.

Q. During the day? A. Yes, there was.

Q. And do they note how many trips they make? A. Yes.

Q. And do they note what they carry? A. Yes.

Q. And are those—is that a photostatic copy of time sheets that were used for each of the trucks that were being used on April 24th, 1972? A. Yes.

Q. And do they indicate how many loads were carried on each truck that day?

Mr. Edelman: Your Honor, I respectfully object. Speaks for itself.

The Court: Objection sustained.

Mr. Sergi: May I have this marked for identification.

The Clerk: Document marked Defendant Maggiolo Exhibit Y for identification.

(So marked.)

By Mr. Sergi:

Q. Are these trip tickets, are they kept in the regular course of business? (1491) A. Yes, they are.

Q. Of Maggiolo? A. Yes.

Q. What's the purpose of keeping those trip tickets? A. Well, because they are rented trucks. The idea see how much work that the men did for the day and which men they had on for payroll purposes.

Q. And those trucks are kept every day and they are records kept in the regular course of business of Maggiolo? A. Right.

Mr. Sergi: I now offer it.

Joseph Diaco, for Defendant Maggiolo, Cross

Mr. Edelman: I—

The Court: Is part of Maggiolo's business to keep those records?

The Witness: Right, yes, it is.

Mr. Edelman: No objection, your Honor.

The Court: Let it be marked.

The Clerk: Defendant Maggiolo's Exhibit Y previously marked for identification now marked in evidence.

(So marked.)

The Court: Let it be marked, Mr. Edelman.

• • •

(1497) *Cross Examination by Mr. Edelman:*

• • •

(1537) The Court: Would it be payroll books?

The Witness: Payroll books are taken off the sheets.

The Court: But they would be in addition?

A. Yes, but this is it basically.

The Court: This, basically, is everything that Maggiolo has concerning what transpired there?

The Witness: Right.

Mr. Edelman: May I have the second two pages in evidence?

The Court: Any objection?

Mr. Sergi: I have no objection.

The Court: Let it be marked.

The Clerk: Defendant's exhibit Z for identification is now marked as Plaintiff's exhibit 32 in evidence.

(So marked.)

Joseph Diaco, for Defendant Maggiolo, Cross

By Mr. Edelman:

Q. Mr. Diaco, do I pronounce your name correctly, sir? A. Right.

Q. All right, sir.

* * *

(1542) A. Yes.

Q. And were you advised also that according to that map, the dump site was past Frieda's Bungalow? A. Yes.

Q. And of necessity, to go from wherever the houses were being demolished, they had to go along Glenwild Road down past Frieda's Bungalow Colony to the dump in order to dump it? A. Yes.

Q. And they did it on the day of this occurrence; isn't that so? A. Yes, they did.

Q. And as a matter of fact, isn't it a fact that the four drivers, each of them went ahead and had much more junk on their trucks than they had sand that day? A. Yes.

Q. All right.

As a matter of fact, to come back to the four drivers, isn't that a factual situation that as far as—I cannot read it— A. Authorized signature—

(1543) Q. Yes. A. J. Diaco.

Mr. Sergi: Diaco.

By Mr. Edelman:

Q. Isn't that you, sir? A. That is right.

Q. All right.

You, yourself, on the day of this occurrence took 8 junk and 5 sand; is that correct? A. Yes.

Q. So therefore, during the time you were— A. No, you mean—

This is my signature here, I didn't take this (indicating), this truckdriver (indicating) took it.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. All right.

DeGroat took it? A. Right.

Q. Is that correct? A. Yes.

Q. Then therefore, as far as DeGroat is concerned, he took the 8 junk and the 5 sand from the town, past the area where we claim the accident occurred; is that right? A. Right.

Q. Now to come back to the second fellow, (1544) Harold Utegg, didn't he also, on that day, take 8 junk and 5 sands past—not the 5 sands, didn't he take 8 junk and 5 sands that day? A. Yes.

Q. And the 8 junk also, he took with a dump truck past this place where the accident occurred? A. Yes.

Q. Right.

Now come to David Utegg, isn't it a fact that he, also, that David Utegg took 9 junk that day and 5 sand? A. Yes.

Q. And also the last individual, who is Milo Conklin, he took 3—6—9 junk and 5 sand? A. No, he just got it marked down like this, that was his complete load count, he don't show whether he took sand or junk.

Q. In any event, wouldn't it be about the same percentage of junk as to the other? A. Yes.

Q. 8 or 9 junk as to about half sand? A. Yes.

Q. Is that right? A. Yes.

Q. Okay.

(1544a) Mr. Edelman: Excuse me, your Honor.

(At this point Mr. Edelman conferred with Mr. Orseck.)

(1545) By Mr. Edelman:

Q. Isn't it a fact that according to the calculations, they were about twice the amount of junk or debris taken to the dump than sand delivered into the town? A. Approximately one-half, possibly.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. How many hours a day did they work? A. Eight hours.

Q. They started at eight o'clock? A. Right.

Q. And then they had a half hour for lunch? A. Yes.

Q. And therefore they would stop at what, four o'clock?
A. 4:30.

Q. 4:30.

Then what would happen—pardon me—from eight o'clock until twelve o'clock is four hours; is that correct?
A. Yes.

Q. And then from 12:30 to two o'clock is an hour and a half? A. From when, twelve—

Q. From 12:30, you said they have a half-hour lunch?
A. Right.

(1546) Q. Right. From 12:30 to two o'clock you say is an hour and a half? A. Right.

Q. So that being five and a half hours up to two o'clock, and about two and a half hours from two o'clock until their quitting time; is that correct? A. Correct.

Q. And is it your testimony that to take about twice the number of loads of junk it took about half the number of—half the time that it took to take the loads of sand?

The Witness: Would you repeat that question again?

Mr. Edelman: May I have it read, please.

(The reporter repeated the question.)

A. As timewise, I would say that is the way it looks on the sheet, it says 34 loads to 20 loads, it takes the same time to deliver the sand as it does the junk.

Q. All right. So therefore if it takes the same length of time, length, therefore by simple calculation is it correct that they would be working at least twice the length of time taking junk as they would be taking sand, even

Joseph Diaco, for Defendant Maggiolo, Cross

though the same was being delivered in town; isn't that factually correct?

* * *

(1588) It doesn't have to be introduced into evidence.

By Mr. Edelman:

Q. (Continuing) "Our crew worked from 8:00 a.m. to 4:30 p.m., with lunch time 12:00 noon to 12:30. During this time, each of the four Gorr dump trucks dumped"—doesn't say trucks, "transported about nine loads of debris. They also transported about five loads of sand each."

Was that what was in the statement? A. Yes.

Q. Was that true? A. Yes.

Q. All right.

And also according to the trip tickets, it shows that—for instance, David Utegg had nine junk and five sand; is that right, sir? A. Yes.

Q. And also that H. Utegg had eight junk and five sand, is that right, sir? A. Yes.

Q. All right. Now, may I go back to the—

The Court: Yes.

Mr. Edelman: All right.

(1589) *Cross Examination by Mr. Edelman: (Cont'd.)*

Q. I think you stated on your—during the cross examination that there was about twice as much junk than sand transported that day, is that correct? A. Roughly, Yes.

Q. All right. And therefore, is it not a fact that according to simple arithmetic, that if you had nine junk or nine dump and five sand, that the nine dump trucks or the nine junk would take five hours and 40 minutes and the five sand would take two hours and 40 minutes, if each of the loads took the same period of time?

Joseph Diaco, for Defendant Maggiolo, Cross

Mr. Sergi: Objection to the form.

The Court: Sustained as to form.

Q. All right. Do you remember in your statement that you stated that it took 40 mintues for a load of dump or debris or junk to be—to go—to go from the site to the dump and come back, is that right? A. I don't remember.

Q. All right. May I again point to—approach the witness? By the way, did you read this statement at any time before you testified after you gave the statement on June 19, 1973—74? A. No.

(1590) Q. Never saw it again? A. No.

Q. All right.

The Court: Until last Thursday?

A. Yes. Well, yes.

The Court: Have you read it since last Thursday?

The Witness: I still haven't read it, no.

The Court: Did you read it today?

The Witness: No.

Q. Remember this portion of this statement? That on the—after stating that the trucks transported about nine loads of debris and five sand and you—you then described the route that they took from the demolition site on Coleman Street and then you stated, "went east on Coleman, then made a right turn to go south one block on Warren Street, then right, westerly on Green Street, and then a left turn southerly on—up the hill on to Broadway, which curves to the left and then goes east, a long block past the—what street? A. Lew Street.

Q. Lew Street to Glenwild Drive, to the right and eventually heads south to the town dump, which is on the right or westerly side of Glenwild Drive. This is (1591) the same road that goes past the Freida's Bungalow,

Joseph Diaco, for Defendant Maggiolo, Cross

which are on the east side of Glenwild Drive nearer to Broadway than where the dump is located. Each run to the dump including loading time was about 40 minutes from loading time to the time the trucks returned. Do you remember that, sir? A. If I have it down there.

Q. Well, read it. Does that—is that what it says? A. That's what it says.

Q. All right. Now, if—if each trip to the dump dump was 40 minutes and they took nine trips to the dump, nine times 40 is 360 minutes, is that correct, sir? A. Right.

Q. And that would be six hours, is that right, sir? A. That's correct.

Q. And therefore, sir, is it not correct that the men according to those records only worked eight hours that day? A. Correct.

Q. All right. And therefore, isn't it a fact that the sand, the time to travel or take the five loads of sand would be two hours? (1592) A. Two and a half.

Q. Well, if it would take six for the debris and they worked eight, the other—there are only two hours left, is that right? A. Right.

Q. So therefore, take two hours for the sand, is that right, sir, according to simple calculation? A. Yes, according to—yes.

Q. And therefore, if they began loading sand at eight o'clock in the morning and you said they worked continually and they loaded for only two hours they would end loading sand at 10:00 o'clock, is that correct, sir, according to simple calculation?

Q. You are saying according to simple calculation, yes, I would agree.

Mr. Sergi: Objection to the form—excuse me?

The Court: Sustained as to form. Strike the answer.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. Isn't it a fact that according to your statement, that each trip to the dump would be about 40 minutes, is that right? A. Yes.

Q. And therefore, if they took—if the drivers—

(1593) The Court: Is that round trip?

The Witness: Round trip, right.

The Court: 40 minutes.

Q. And therefore, if they took nine trips, that would be 360 minutes, is that right, sir? A. Yes.

Q. And that would be six hours? A. Yes.

Q. And therefore, the other two hours would be sand, is that right, sir? A. According to the statement, yes.

Q. All right. And you said the statement was true? A. Yes.

Q. All right. A. Taken by—what I remember on it, yes.

Q. All right. And therefore, if they began at 10:00 o'clock in the morning—at 8 o'clock in the morning and they took sand for two hours, that would end at 10:00 o'clock in the morning, is that correct? A. If they started at 8:00? And they just delivered sand? According to what you are saying, it's two hours, would be 8:00 to 10:00, yes.

Q. All right.

(1594) Mr. Sergi: Objection to the form of the question. Move to strike the answer.

The Court: I'll allow it. I'll allow it to stand.

Q. And therefore, then from 10:00 o'clock on, until 4:30 in the afternoon, according to these records and simple calculation, they would be taking debris to the dump, is that correct, sir? A. According to calculation, I would say yes.

Q. Isn't that correct? A. According to calculation.

Joseph Diaco, for Defendant Maggiolo, Cross

Mr. Sergi: Judge, is what correct, your Honor?

Mr. Edelman: That they would be taking dump or taking—taking junk to the dump from 10:00 o'clock in the morning until 4:30 in the afternoon.

The Witness: No.

The Court: Were the sand trips a shorter distance than a trip to the dump?

The Witness: They were in different locations in town. So—it was—over there they—it was wet spot. And they would get stuck. Could have been a lot of things. At 10:00 o'clock in the morning like he's saying from 8:00 to 10:00 o'clock in (1595) the morning, he's just saying, putting two hours for sand and six hours for debris. Now, I'm not—

The Court: I don't want you to answer any other question. I just want to know whether the travel time from the loader for the sand to the place where it was dumped, was that a shorter distance in time?

The Witness: Yes.

The Court: It was?

The Witness: Yes.

(1596) The Court: The trip to the dump would take more time than dumping the sand; right?

The Witness: Yes.

The Court: Mr. Edelman says if you had eight trips to the dump or nine trips, round trip would—nine trips would be 360 minutes, which is six hours?

The Witness: Right.

The Court: If they completed their work at 4:30 and you computed it back, wouldn't that take you to ten o'clock in the morning?

The Witness: Yes. It would take you to—If you take six hours from six—from 4:30 back, it would take you to 10:00 o'clock in the morning. I would say yes to that.

Joseph Diaco, for Defendant Maggiolo, Cross

By Mr. Edelman:

Q. Isn't it a further fact that according to your statement it would take ten minutes to go to the dump? A. Yes.

Q. All right. But it wouldn't take ten minutes, sir, to take sand, say, from this area on Coleman Street and to go one or two blocks to Roosevelt Avenue; would it?

Mr. Sergi: Objection.

The Court: Overruled. I will allow it.

A. No.

(1614) The Witness: Not that I recall, no.

The Court: All right.

Q. All right. Isn't this what you specifically signed and stated in your statement: "The total loads for"—I am reading exactly on page 7—"The total loads for the April 24, 1972, were 34 loads of wood and 20 loads of sand. In going from the demolition site to the town dump and—the trucks traveled east on Coleman and then make a right to go south one block on Warren Street, then right westerly one block on Green Street, then a left turn southeasterly up the hill to Broadway, which curves to the left, and then goes east a long block past Lou Street to Glenwild Road, to the right, and eventually heads south to the town dump, which is on the right or westerly side of Glenwild Drive. This is the same road that goes past Freida's Bungalow Colony, which—Freida's Bungalows, which are on the east side of Glenwild Drive nearer to Broadway than to where the dump is located. Each run to the dump, including loading time was about forty minutes from the loading time to the time the trucks returned."

Didn't you specifically state that in your statement? A. Yes, I did.

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Joseph Diaco, for Defendant Maggiolo, Cross

(1639) The Court: Is this the way you loaded the trucks on the 24th? Is that the way they would look?

The Witness: I'd say pretty close to it.

The Court: All right.

The Clerk: Plaintiff's exhibit 41, previously marked for identification is now marked in evidence.

(So marked.)

The Court: Now, seat the jury.

How much longer are you going to be with this witness, Mr. Edelman?

Mr. Edelman: About twenty minutes, your Honor.

The Court: It's amazing.

(Jury present.)

Cross Examination by Mr. Edelman: (Cont.)

Mr. Edelman: May I have—your Honor, I don't know where the picture is.

May I show it to jury?

The Court: Surely.

What exhibit number is that?

The Clerk: 41, your Honor.

The Court: 41 is shown to the jury.

(Being shown now.)

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(1641) The Clerk: It's over here.

Mr. Edelman: Oh. May I?

Q. At page 4 of your statement, have you got page 4, sir? A. Yes.

Q. All right.

About the eighth line down, it says, "From 12:00 noon to 12:30 p.m., myself and my crew, including the Gorr truck drivers, were at lunch and I was at a luncheon-

Joseph ... for Defendant Maggiolo, Cross

ett, near Highland Avenue and Broadway in town. The trucks were ...—were some at the dump and some at the town job demolition site."

Did you specifically state that in your statement? A. Yes.

Q. All right.

And if that's so, isn't it a fact that prior to 12:00 o'clock, one of the trucks or some of the trucks would have to be hauling debris from the demolition site in town to the dump?

Mr. Sergi: Objection.

The Court: Sustained as to form. It's argumentative.

Will you please ask the witness whether the (1642) trucks were at the dump at 12:30? Were they at the dump at 12:30 on April 24th?

The Witness: No, they were not.

Q. Did you specifically state in your statement—

The Court: Objection sustained.

He said he said so in his statement.

Mr. Edelman: All right.

Q. Now, to—Mr. Alvin Banner, you stated that he was employed by the Maggiolo Corporation on the date of this occurrence and before that occurrence; is that correct? A. Yes.

Q. Was—wasn't virtually his entire job was to follow the Maggiolo trucks or the trucks being operated by the Maggiolo drivers from the demolition site to the dump site and to pick up any debris that would fall off in the route? A. Yes.

Q. And that includes lumber, planks or anything else that would fall off, is that right? A. Yes.

Q. And he had a pickup truck for that purpose? A. Yes.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. Is it not a fact that the reason that Banner was hired to do this job was that someone connected with the

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(1651) The Court: Objection sustained.

Mr. Edelman: I think I only have one more point.

Q. Do you remember this meeting at the Patio Motel on Sunday, when you stated you got \$50? Do you remember that meeting? A. Yes.

Q. And you stated each of the men that were there got \$50, including Harold Utegg, Milo Cenklin, Byron Dubois, Wilbur DeGroat, and Al Obanner; is that correct? A. Yes.

Q. Have you—By the way, did you ever discuss this accident with Al Obanner? A. Prior—At what time?

Q. At any time. A. At any time, yes.

Q. All right. When was the first time you discussed this accident with Obanner, the fellow that was supposed to pick up the debris that fell off the trucks? A. At the Patio Motel.

Q. Did you ever speak to him on the day of this occurrence and see what he knew about this accident and whether or not he picked up a board on Glenwild Road right opposite Frieda's Bungalow Colony on the day of this (1652) occurrence? A. No.

Q. Have you seen Obanner in court? A. No.

Q. Have you spoken to Obanner from any time—Pardon me. Did you ever speak to Obanner from the day of this occurrence to the time you met at the Patio Motel in July 1971 regarding this accident or this action? A. No.

Q. Now, how were you called to the Patio Motel? A. By telephone.

Q. Who called you? A. I don't recall if it was Mr. Sergi or the office.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. Which office are you referring to? A. Mr. Sergi's office.

Q. And you were home at that time? A. Yes.

Q. Was this on the same day that you went there? A. No. Oh, wait, maybe—maybe it was by letter. It might have been a letter. I don't recall if it was a letter or a telephone call.

Q. Have you got a copy of the letter? A. No.

(1653) Q. In any event, according to your best recollection, someone sent you a letter and told you to be at a certain motel on a certain time at a certain place, is that correct? A. I think—I don't know if it was a call or by letter. I don't recall which way it was sent to me.

Q. Did you say just a moment ago that you think it was by letter?

Mr. Sergi: Objection.

The Court: Would you read the prior answer.

We are going to stop this.

(Record read)

Q. Would you please tell us your best recollection whether it was by letter or by telephone call? A. I would say telephone call.

Q. And what time did you get there? A. Noon.

Q. And where did you meet? A. Where did we meet?

Q. Yes. A. In the parking lot.

Q. And where did you go? A. Where did we go?

Q. Yes. (1654) A. Into the motel to see if—

In this office, or whatever it was, office space available there.

Q. And at that time did you go into any room? A. Yes.

Q. And how did you know to what room to go to? A. No, we didn't know. We just was waiting there. That's the only room that they have in the motel. The rest of them are just for living quarters.

So we knew what room it would be in.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. Did you go—Pardon me. You met in the lobby or somewhere near the main desk of the motel, is that right, sir? A. On the side, right, in the parking lot.

Q. And then after that where did you go? Please tell us. A. We went into this office space, this room.

Q. It was an office space, or was it a bedroom? A. No, it was an office space, an empty room with a table, chairs around it; that's what it was.

Q. Was there anyone else there besides the people you have mentioned? A. No.

Q. You stated that there was a stenographer there; (1655) is that correct? A. Yes.

Q. At that time did they ask you any questions? A. Yes.

Q. Did they take down what you had told them of what you remembered of this occurrence? A. Yes.

Q. Did they ask you to sign it? A. No.

Q. Did they take down what Milo Conklin stated? A. Yes.

Q. Were you there when Milo Conklin was being questioned? A. I don't remember.

Q. Do you remember anything that Milo Conklin told them of what he knew of this accident? A. No.

Q. Or what occurred that day? A. No, I don't remember.

Q. Were you there during—Pardon me. You said you were there about two, two and a half hours, is that right, sir? A. Right, yes.

Q. During all this time were all these other people there, for two, two and a half hours? (1656) A. Right.

Q. During all the time you were in a room about how big? A. Twenty by twelve.

Q. And there'd be no difficulty in hearing what Mr. Sergi stated or what these other gentlemen told Mr. Sergi? A. No.

Joseph Diaco, for Defendant Maggiolo, Cross

Q. Is that correct? Is that correct? A. Correct.

Q. How long did he speak to you? A. Fifteen-twenty minutes.

Q. And during the other two hours or so you were just sitting there listening to questions that Mr. Sergi had asked the other gentlemen; is that correct? A. Yes.

Q. Do you remember anything that Milo Conklin was either asked or told Mr. Sergi that day during the other two and a half hours you were sitting there and listening to this? A. No.

Q. Did you speak to Milo Conklin at any time of what he knew about this accident? A. No, just they were talking in between the—(1657) you know, in the session there, but he didn't say nothing anyhow, so I don't remember him saying anything at all. And I believe he left—I left before he even said anything.

Q. Now, as far as Bryan DuBois, were you there when Mr. Bryan DuBois was asked any questions? A. I don't remember.

Q. Do you remember anything that Bryan DuBois said—
A. No.

Q. —at that time?

How about Mr. DeGroat? Do you remember anything what he said or what answers he gave? A. Yes.

Q. All right. And Mr. DeGroat was who? A. He was the dozer operator.

Q. What? A. Dozer operator, B-5 dozer operator.

Q. But he was at the dump, is that right? A. Yes.

Q. He wouldn't have any knowledge, would he, of anything that may have occurred on Glenwild Road; is that correct? A. Correct.

(1658) Q. Now to come back to Obanner, were you present when he spoke to Mr. Obanner? A. Yes.

Q. And could you tell us to the best of your recollection what was asked of Mr. Obanner and what he stated at that time? A. No.

Joseph Diaco, for Defendant Maggiolo, Re-direct

Q. You have no idea? A. Don't remember what he said.

Q. And the last one was Al McDowell, by the way, and he was the fellow who did the loading with the front-end loader at the job? A. Yes.

Q. Do you remember anything that was asked of him during all this time and what his answers were? A. Yes.

Q. Well, could you tell us what was asked of him and what he stated? A. Well, I remember he said that he loaded up the truck with gravel about ten minutes to 12:00 or five minutes to 12:00, then he met me at lunch-time, he went and he ate lunch.

Q. And that's all he stated; is that right?

Was any statement shown to any of these (1659) gentlemen? A. Was any statement shown?

Q. Yes, written statements or any materials shown by Mr. Sergi or anyone else to any of these gentlemen? A. Not that I know of.

Q. This meeting was in July; is that right? A. Yes.

Q. And you had given a written statement on June 19, 1974; is that correct, before this meeting? A. Right.

Q. Did they ever show you your statement? A. Not that I remember.

Mr. Edelman: Excuse me, your Honor. May we just have just one moment, your Honor, please?

No other questions, your Honor.

The Court: Mr. Sergi.

Mr. Sergi: Yes, thank you.

Re-direct Examination by Mr. Sergi:

Q. Do you remember at what time of the day on April 24, 1972, the chief of police came to the place where you were working? A. Yes.

Q. About what time was that?

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Alan MacDowell, for Defendant Maggiolo, Cross

(1706) ALAN MACDOWELL, called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

The Clerk: Will you state your name and spell it, please.

The Witness: A-l-a-n MacDowell M-a-c D-o-w-e-l-l.

Direct Examination by Mr. Sergi:

* * *

(1724) Q. And then did you proceed to load the trucks?
A. Yes. I started to load the trucks. They started to take that out to Glenwild Road, then out to the dumps.

Q. Did you remain at that site all the rest of the day?
A. Yes, I did.

Q. Until what time of the day did you work? A. 4:30.

Q. 4:30? A. Yes.

Q. Now, between 3:15 p.m. and 4:30, how many trucks did you load with debris? A. I loaded four trucks but I wouldn't keep track of them.

Q. Approximately. A. Let's say maybe four.

Q. And did any of these trucks make more than one trip from 3:15 until 4:30 in the afternoon? A. No.

Q. Just one trip each? A. One round trip. That would be it, because when they came back, they was laid off that day.

Q. They were laid off that day?

(1726) Cross Examination by Mr. Edelman:

* * *

(1737) A. Railroad track, right here.

Q. You said hardware store? Would you please place the— A. Hardware.

Q. Am I correct that in your direct testimony you stated on the day of this occurrence, on April 24th, 1972, you were tearing down and you were loading the debris from the hardware store? A. April 24th—

Alan MacDowell, for Defendant Maggiolo, Cross

Mr. Sergi: At what time?

The Witness: After 3:00 o'clock in the afternoon.

Q. All right.

Was it on the—on April 24th, did you—were you tearing down the hardware store and loading that debris on the trucks? A. Yes, I was but this is not the truck.

Q. All right. A. It was the Gorr trucks, if you'll show some more of the Gorr trucks; this truck was not on the job that day.

Q. But it was being— A. This truck was not on the job that day.

* * *

(1740) A. Yes.

Q. Could you please on the bottom of Plaintiff's Exhibit 23 the word "Gorr" truck? A. Yes.

The Court: All right.

Q. I show you Plaintiff's Exhibit No. 39. Is that a fair representation of the—one of the Gorr trucks that were being used on this job on that day? A. That's one of the trucks that would be used on that day, yes.

Q. All right.

Can you please— A. Not with this stuff on it, though.

Q. All right. A. Not in the morning, in the afternoon I'll go along with it. After 3:00 o'clock.

Q. Okay. Fine.

Would you please place the word "Gorr" trucks, "Gorr" truck.

Q. All right. And you state that it is a fair representation how it was loaded after 3:00 o'clock; is that right, sir? A. Yes.

Q. All right.

Would you please place the date then—

* * *

(1743) This big long building.

Alan MacDowell, for Defendant Maggiolo, Cross

Q. That's— A. Started at 3:00 o'clock in the afternoon.

Q. All right.

That is—would you please put number "1" here? A.
Number "1" what?

Q. Just that this is one of the buildings that was going
to be torn down after the 24th or— A. After 3:00 o'clock
on the 24th?

Mr. Sergi: Your Honor, what is he asking him
to do? I don't understand.

The Court: Mr. Rudolph.

(Record read.)

Mr. Sergi: I don't understand that number "1"
—what is it going to designate?

The Court: Don't do that.

* * *

(1758) The Court: I understand that. Now, at 3:00
o'clock or 3:30 or 4:00 o'clock or 4:30, when you loaded
the truck, did it look something like that?

The Witness: Yes.

The Court: All right. The same type of material?

The Witness: Yes.

The Court: The loads stacked about the same way?

The Witness: Yes. Wood.

The Court: That's all I want to know. What other
pictures do you intend to introduce?

Mr. Edelman: Offer all of them, your Honor.

The Court: Objection sustained to 42 because it
shows nothing more than a loader. Unless it's—
unless it's there just to demonstrate the type of
loader that loaded.

Mr. Edelman: That's all.

The Court: I don't see how that's material to the
loading.

Mr. Edelman: That's the only purpose I think
the—the materiality—

Alan MacDowell, for Defendant Maggiolo, Cross

The Court: Do you object to 42? It shows (1759) the type of loader.

Mr. Sergi: Yes, I object to it, your Honor.

The Court: Objection sustained. This case is not based on any defect in the loader or the way the loader was used to load the trucks. It's based on the amount of the load and the type of material that was put on the truck after the truck was loaded and sent on its way. If it was loaded by hand and loaded this way, it would be the same thing. Next.

I show you 39. I ask you the same question. Again that's another picture. Would you say that looking at a picture, that's the type of material and the way the truck was loaded on April 24, 1972?

The Witness: Yes. After 3:00 o'clock, I say.

The Court: All right.

The Witness: Your Honor, after 3:00 o'clock, if you can—

The Court: Objection overruled.

Mr. Edelman: May I take off the back?

The Court: I'll ask you the same question as to that. Never mind when it was done. I want to know whether that's the way you loaded the trucks?

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Brian DuBois, for Defendant Maggiolo, Direct

(1819) BRIAN DuBOIS, called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Sergi:

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(1823) between the hours of 8:00 a.m. and 12:00 noon, you, in your truck that you were driving for Maggiolo, made any trips down Glenwild Road to the dump? A. No, I didn't.

Q. Did you make any trips to the village dump at any time that day? A. Yes, I did.

Q. At what time of the day do you say that you drove to the village dump for the first time on April 22, 1972? I'm sorry. April 24th. A. It was the latter part of the afternoon.

Q. Can you be more specific about the latter part of the afternoon? A. Well, it was about a quarter after 2:00, 2:30, we said to the boss, Joe, that we were going to go for an afternoon coffee break. We went, we left the trucks sitting. We went for the coffee break and they came into the restaurant where we were having coffee and said that they were ready to start moving the material.

(1824) Direct Examination by Mr. Sergi: (Cont.)

Q. You went back shortly after 2:15? That's when you took your first load down Glenwild Road? A. That is right.

Q. Now, do you have any personal recollection at this time where it was that you were picking up the foundation and carrying it to the laundry? Do you remember? A. Yes, I remember.

Q. Is it—you can come over here with a pointer, Mr. DuBois, and indicate where you say you were picking up the foundation and carrying it to the laundry. A. Where is Main Street in Woodridge here?

Brian DuBois, for Defendant Maggiolo, Direct

Q. You want Broadway or Gracen Street? There is no Main Street.

Mr. Edelman: Your Honor—

The Court: Strike it out.

The Witness: Well, here—I see where I am now. Here is Glenwild Road. We were picking up the material from this site here.

Mr. Sergi: Indicating the circle, your Honor, with initials A.M.D.

Q. Yes? A. And we would come up this street (indicating).

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(1858) A. I made one because I got laid off that day.

Q. How about the other drivers? A. They made the same.

Q. Each truck made one trip; is that correct? A. Yes.

Q. What time? A. We were laid off at 3:30 that day. And that was—well, that was my last working day there.

Q. Now, did anybody contact you and discuss this accident with you after that date at any time? A. Yes. I have been contacted quite a few times.

Q. Who was the first person or whose office was the first to contact you regarding this accident? A. The first one to contact me was R & H Gorrs.

Q. Gorrs? A. The owner of the trucks.

Q. OK. And as a result of that inquiry by Mrs. Gorr, did you go down to Mrs. Gorr or the Gorr's office to discuss this? A. No. Our first conversation was just over the phone.

Q. Did you ever go to her office or their office

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(1906) "Question: When you left, Harold and Dave and Dave's wife were still there?"

Brian DuBois, for Defendant Maggiolo, Direct

"Answer: No.

"Harold went with me. I rode to Liberty with Harold.

"Question: Wait a moment. While you were there did Orseck speak to Harold, also, or did he just speak to you while you were there?

"Answer: He took Harold aside and spoke to him separately.

"Question: You didn't hear that?

"Answer: I was in his office and he had taken him in the different room.

"Question: I see.

"Then there came a time that he said good night and you and Harold picked up and left?

"Answer: The two of us left.

"Question: And Dave and his wife remained?

"Answer: Yes.

"Question: Did you go back?

"Answer: He told me that he was going to contact me again, but to this day I never heard a thing.

"Question: In your mind you are secure and sure that at no time, as far as you know, did any of (1907) the Gorr trucks that were working for Maggiolo on that day when this fellow Elliott was supposed to have gotten hurt, go down Glenwild Road?

"Answer: Yes, I am positive of it.

"Question: Then what you have told us is the truth and you are willing to testify in court if you have to?

"Answer: I will.

"Question: What, if anything else, did Mr. Orseck say to you while you were in his office that time?

"Answer: He said he wanted me to change my story and be a friend of his, or else he would kick the shit out of me. I told him he would be the first person that ever kicked the shit out of me.

"Question: Was there any animosity?

"Answer: He said that two or three times, that same phrase.

Brian DuBois, for Defendant Maggiolo, Direct

"Question: Was anybody else present when this was said?

"Answer: Harold was present?

"Question: Anything else that he said? I want it all.

"Answer: Well, he wanted me to help him.

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(1914) Q. What did you tell him? A. Well, I told him I wasn't near the road that day or any of the trucks were, and that it wasn't involved in it.

Q. What did Mr. Orseek say to you then? A. Well, he asked me if I would go along with him to help Mr. Elliott. And I said, Mr. Orseek, my story—if my story helps you, I says, I'm helping you.

I says, if it doesn't help you there is nothing I can do about it.

Q. What story are you talking about?

Mr. Edelman: Pardon me.

I respectfully object.

The Court: Objection overruled.

I will allow the witness to testify, but again, the mere fact that this witness says he told something to Mr. Orseek about his involvement or lack of involvement in the accident that occurred does not support what this witness told you under oath as to how the accident happened.

In other words, the mere repetition doesn't add to credibility. However, I am allowing this testimony to come in on the theory, and on the claim that the

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(1916) *Direct Examination by Mr. Sergi: (Cont.)*

Q. Will you tell us what story you were telling Mr. Orseek about the happening of this accident, please? A. I told him that four of us were moving material up to

Brian DuBois, for Defendant Maggiolo, Direct

the steam laundry that morning and were nowhere near this Glenwild Road.

Q. What did Mr. Orseck say to you when you told him that? A. Mr. Orseck wanted me to say—he didn't care about what day it was—but that a piece of wood could fall off my truck.

Q. What did you say to that? A. Wood did fall off my truck.

Q. What did he say to that? A. He said, all right. And that's when he asked me if I would go along with him.

Q. And did he ask you anything about the accident to Mr. Elliott? A. Pardon?

Q. Did he ask you anything about the accident to Mr. Elliott? A. He asked me if I seen a man on the road that day, I said, I wasn't up the road. I said, I couldn't see a man.

. . .

(1918) claim? A. I only got one story, Mr. Sergi, and that's the way it happened. I can't change that story for nothing.

Q. That's not what I asked you. I'm asking— A. He asked me to go along with him.

Now, I didn't say how am I supposed to go along with you, all I said, if my story is going along with you, I'll go along with you. If my story doesn't go along with you there is nothing I can do for you.

The Court: Did he say, "I want you to testify or I want you to make a statement and say this:"

Did he tell what he wanted you to say, in any respect, to what happened on the 24th, did he tell you what he wanted you to say?

The Witness: He was mainly interested that a piece of wood could fall off of my truck.

I told him this day I was not hauling wood in the morn-

Brian DuBois, for Defendant Maggiolo, Cross

ing. He says, I don't care about that. Could a piece of wood fall off of your truck? I said, yes. Wood did fall off of the truck. We had a man picking up wood that fell off of the truck.

The Court: Did you tell him that you had not been down on Glenwild Road on the morning of April 24th?

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(1923) The Court: Overruled. I will allow it.

A. Pardon?

Q. How many times did you tell Mr. Orseck you were not on the road that day? A. Repeatedly.

Q. And whenever you said to him, "I was not on the road that day," what did he say to you? A. He was—when I said, "I wasn't on the road," he says, "All I want you to say is that a piece of wood could fall off your truck."

Mr. Sergi: I have no further questions.

Cross Examination by Mr. Edelman:

Q. Mr. DuBois, when was the first time you heard of this case? A. The first time I heard of this was 1973.

Q. Did you ever discuss this case at any time before 1973 with anyone? A. Other than the noontime of the day it happened, no, had no reason to.

Q. And the noontime the day it happened, you said that was around 12 o'clock; is that correct? A. It was after 12:00 o'clock.

(1924) Q. Shortly after 12:00 when you began your lunch? A. Right.

Q. Is that right, sir? A. That's right.

Q. And therefore, if that is so, it is not a fact that the accident must have happened sometime before that time?

Mr. Sergi: Objection.

The Court: Objection sustained.

Brian DuBois, for Defendant Maggiolo, Cross

Q. All right.

Now, to come back to your conversation with Mr. Orseck,—by the way, when someone first called you on behalf of Mr. Orseck's office they stated you would be paid for your inconvenience; is that right? A. That's exactly what was said.

Q. And, however, is it not a fact that Mr. Orseck never gave you one single, solitary penny? A. That's right.

I ended up doing a little charity work that evening.

Q. All right.

And you resented that a little bit, did you not? A. When somebody promises me something, sir, I mean, I don't make promises or stories that I don't keep.

(1927) The Court: That's the answer.

By Mr. Edelman:

Q. Let's come back to how many times people bothered you regarding this occurrence over the period of years.

A. You know, I didn't keep no scoreboard but I would get a call—I made a couple of recordings on the telephone already—

Q. Recordings on the telephone? With whom? A. With Mr. Bruce—

Q. Mr. Bruce— A. (Continuing)—Holmes.

Q. Have you got those recordings?

Mr. Sergi: I object to the voice insinuation.

The Court: Go ahead, Mr. Edelman.

Q. Have you those recordings? A. They are the same story—

Q. Pardon me, Mr. DuBois,—have you those recordings?

A. Have I them?

Q. Yes. A. What would I have them for? I didn't tape them.

The Court: You said you made recordings.

Brian DuBois, for Defendant Maggiolo, Cross

(1928) Do you mean you made tapes or a written record of the telephone calls?

The Witness: The man called me up and said, "I'd like to have an account of the story.

Is it all right if I make a recording of the telephone call?"

And I said "Yes. Go ahead. It is what happened."

By Mr. Edelman:

Q. When was the first time Mr. Holmes called you in connection with this particular occurrence? A. It was in—well, last May—not last—this past May of 1974 is when things really started happening.

That's when Mr. Holmes started getting in touch with me, when Mr. Orseck's office started getting in touch with me. That's when it started moving.

Q. And was that before you spoke to Mr. Orseck at his office or after you spoke to Mr. Orseck at his office that you spoke to Mr. Holmes? A. I spoke to Mr. Holmes before I got a call from Mr. Orseck.

Q. And did Mr. Holmes tell you he represented the attorneys for Maggiolo? A. Yes, he did.

(1929) Q. And did he tell you he is making a record of your conversation? A. He did.

Mr. Edelman: At this time I ask for the production of the recording, your Honor.

Mr. Sergi: Your Honor has admonished Mr. Edelman about this.

The Court: Did I ask you not to make a demand in front of the Jury?

Mr. Edelman: I'm sorry.

The Court: You apologize and keep doing it. You don't obey the directions of this Court. You just completely disregard it every time, Mr. Edelman, no matter how clearly and emphatically I state it.

Brian DuBois, for Defendant Maggiolo, Cross

Mr. Sergi: He is doing it on purpose, your Honor.

The Court: The Jury is excused.

(Jury excused.)

The Court: You are just impossible to control. You don't care about anything the Court says. You just have a way of trying this case and nobody's going to interfere with it,—no one, not defense counsel the Court or the law—nobody.

That's the way you try a case.

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(1932) long before this and Mr. Langan's office had no statement.

This case was marked for trial back in May of 1974, and shortly thereafter I was brought into the case as trial counsel and up to that time there were no depositions and interrogatories were entered by Mr. Langan and the statement made just now by Mr. Edelman is wholly unfair and irrelevant.

The Court: Bring in the tapes and bring in Mr. Holmes, please.

Mr. Edelman: Thank you.

The Court: You do that once more—

Mr. Edelman: I'm sorry. It is a matter of habit.

The Court: I don't care what your habit is. If that's your habit and you can't get out of it you should not try cases in this court.

Try your cases elsewhere. We can't take it.

Mr. Sergi: Once more—and I say it sincerely and regrettably—I don't know how in the world we can try this case with Mr. Edelman's tactics.

This Jury has been contaminated and prejudiced by comments and gestures and by counsel's refusal to accept admonishment in this case.

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Brian DuBois, for Defendant Maggiolo, Cross

(1961) A. Yes, sir, that's what I'm telling this Jury.

Q. Now, to come back to the day of this occurrence, you stated, did you not, on direct examination, that you remember that you were—that you only took one load of debris or one load of wood from one of the sites at Woodridge demolition site to the dump? A. Right.

Q. Is that correct? Is that true? A. That is true.

Q. And that's all you did all day? A. No. I didn't say that.

Q. No. Is that the only load you took to the dump all day? A. To the dump, to the—on the Glenwild Road, yes.

Q. Is there any other way to go to the dump but through the Glenwild Road? A. Not that we use, no.

Q. So is it your testimony that you only took one single solitary load of debris or wood from the demolition site to the dump on April 24, 1972? A. That's right.

Q. Is that your testimony? I cannot hear you. (1962) A. Yes.

Q. Is that as—is that as true as of—of all your other testimony?

Mr. Sergi: Objection.

The Court: Objection sustained.

Mr. Edelman: Okay.

By Mr. Edelman:

Q. And is it also your testimony that each of the drivers worked together at all times on April 24, 1972? A. Yes, we did.

Q. And is it your testimony that each of these drivers only took one load of debris or wood from the demolition site to the dump on April 24, 1972? Is that your testimony? A. They would have to, unless they flew.

Mr. Edelman: May I ask that be stricken?

The Court: Strike it out.

Mr. Edelman: All right.

Brian DuBois, for Defendant Maggiolo, Cross

Q. Is that your testimony? A. I know I took one load. How can I—

The Court: Well, if you don't know how many the others took, say you don't know, but if you do know they only took one load, then say so.

The Witness: One load, to my knowledge, that (1963) we all took, yes.

Q. And did you testify that one person would follow the other person wherever they were going, the four drivers? A. Yes, we all went to the same locations. We didn't—

Q. And therefore, is it not a fact that according to your testimony, you only went and took a load of wood or debris on one occasion, on that day on April 24th to the dump; is that correct?

Mr. Sergi: I object to the form of the question. At what time is he talking about, your Honor?

Mr. Edelman: Any time that day.

Mr. Sergi: All right.

Q. Is that correct, sir? A. One load.

Q. Are you sure of that?

Mr. Sergi: Objection. He's answered it three times.

The Court: Objection sustained.

Mr. Edelman: All right.

Q. Is it not a fact that also, that according to your testimony, the other—all the other three drivers did the same?

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(2015) could not work so that would be an additional 80. That would be \$130 a day.

Q. All right. And how many days would that be? A. I just told you it—

Brian DuBois, for Defendant Maggiolo, Cross

Q. Five days? A. Yes.

Q. All right. That's five times 180; is that right? That's \$500 they owe you already; is that right? A. I have not figured it up.

Q. Or five times 180 is—

Mr. Sergi: It's five times 130.

The Court: Objection—

Mr. Edelman: O.K.

Q. In any event, when you went to this motel in September, did they tell you or did anybody tell you that there was going to be some sort of a legal proceeding in a hotel or in a motel on a Sunday? A. When I was informed of this, they said there would be a court recorder there and the lawyer would be there and he would—is going to ask our story and the court recorder was going to take down everything we said.

Q. Were you under the understanding that when you went there there was some sort of a legal proceeding?

Mr. Sergi: Objection.

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(2027) in Sidney Orseck's office on that statement; is that correct?

Mr. Sergi: Objection. Already answered, your Honor.

The Court: I will allow it again.

Q. Is that correct, sir? A. I told him what went on. He wrote it down. This is all that he wrote.

Q. And that's all that is in the statement regarding what happened in Sidney Orseck's office; is that correct, sir?

Mr. Sergi: Objection. Already answered three times.

The Court: I'll allow it a fourth time.

Brian DuBois, for Defendant Maggiolo, Cross

Q. Could you answer that yes or no? A. Mr. Edelman, I cannot answer that question yes or no.

Q. Is there anything else in that statement about what occurred in Sidney Orseck's office except what I've read?

A. In this statement?

Q. Yes. A. In this statement there is no further information about the visit, no.

Q. Is there one single thing in the statement

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(2033) witness's statement in response to the question.

The Court: Objection overruled.

Just answer the question. Don't volunteer any information.

You see, Mr. Sergi has the right to take you on re-direct examination and ask you questions that might bring out all the information you would like to give in answer to Mr. Edelman's question. But answer Mr. Edelman's questions. He has a right to control the examination.

The Witness: Mr. Edelman, that's what I said in the statement.

Mr. Edelman: Thank you. All right.

By Mr. Edelman:

Q. Did you also state in the statement that, "I was not carrying any lumber or debris on the date of the accident"?

This is on page 3 in the middle of the page. If you want to I'll gladly show you where it is. After the word "truck."

"I told him that I was not carrying lumber or debris on the date of the accident." Isn't that specifically in the statement? A. That's the words that are on this statement, yes.

Brian DuBois, for Defendant Maggiolo, Cross

(2034) *Cross Examination by Mr. Edelman: (Cont'd.)*

Q. And isn't it a further fact that in this motel, when they took the—it's your—took your testimony down, or your story down, or the way they transcribed it—

Mr. Sergi: Objection to the description of what the testimony was, your Honor.

Mr. Edelman: I will withdraw it.

Q. Isn't it a further fact that according to the transcription, on Page 14 you stated, referring to Glenwild Road, "He asked me about the day April 24th.

"Question: Yes.

"Answer: I told him like I'm telling you, about Mr. Slater coming down and asking me, and that was the only thing I remember that particular day. I told him we were not on the road."

And then at page 16 and 19 the same testimony, you stated this question and this answer.

"Question: In your mind, you are secure and sure that at no time, as far as you know, did any of the Gorr trucks that were working for Maggiolo on that day, when this fellow Elliott was supposed to have gotten hurt, go down Glenwild Road?"

(2035) "Answer: Yes, I'm positive of that."

Was that your answer at that time? A. If it's in the statement, that's my answer.

Q. That wasn't true, was it, that you weren't on Glenwild Road that day? A. Mr. Edelman,—

Mr. Edelman: May I have a yes or no.

Mr. Sergi: Objection, your Honor.

The Court: Sustained.

If you can't answer it yes or no, say you can't answer it yes or no.

Brian DuBois, for Defendant Maggiolo, Cross

The Witness: That day we were down the road.

Q. And therefore, those two statements weren't correct, were they, that you weren't on Glenwild Road that day?

A. Not until I learned the rest of the facts. You seem to be pointing out it's not correct.

Q. As a matter of fact, you identified the picture as being a fair representation of how the load you carried on that day on Glenwild Road looked, did you not? A. I am under oath, Mr. Edelman. Yes, that was a picture of the truck.

Q. Let's come back to Mr. Orseck for a moment. Isn't it a fact that he specifically told you that as far

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(2041) were you in the habit of looking continually both in your left rear view mirror, in your right rear view mirror as you drove down the road?

Mr. Sergi: Objection.

The Court: Objection sustained. It's irrelevant.

Q. Now, to come back to—you stated on the day of this occurrence that you were taking concrete and foundation blocks and dirt to the laundry, is that right? A. I said that in the testimony yesterday and also in this, yes.

Q. Now, was this laundry a dump? A. The laundry was not a dump, Mr. Edelman.

Q. You're sure of that, right? A. We weren't dumping wood in there, and I figure a dump is—I mean, it's all according to what you call a dump.

Q. Did you ever tell anybody—by the way, as a matter of fact that the only dump was on Glenwild Road? A. Yes. Unless you call the laundry a dump.

Q. As a matter of fact that laundry had been torn down? A. Mr. Edelman, I'm not a resident of that town. I was just doing what I was told that day. We took (2041a) this material up to the steam laundry and dumped it where we were told to dump it.

Brian DuBois, for Defendant Maggiolo, Cross

(2042) *Cross Examination by Mr. Edelman: (Cont.)*

Q. All right.

Isn't it a fact that the building where the laundry was and near where the laundry was had been torn down?

Mr. Sergi: When, your Honor?

A. I—

Mr. Sergi: Just a moment. Objection. When?
The Court: Overruled.

Q. Before April 24th, 1972? A. Well, Mr. Edelman, when I left that job, April 24, that steam laundry was still in operation, had steam coming out of the pipes so that's not in operation? I don't understand your question.

Q. You were not taking this material to the laundry in order to fill in any torn-down building, were you?

A. Mr. Edelman, it's—it was a place they told us to go dump dirt. I do not know what was there. There was a—it was a dropoff, with—I surmise it was getting filled for a parking lot or something. I—I don't know what you are trying to get me to say.

Q. You know that other buildings had been torn down before April 24th, 1972; is that correct?

* * *

(2052) A. If there was any.

Q. Isn't it also a fact that you and Harold Utegg are very close buddies? A. Yes, sir, that's correct.

Q. And how long have you and Harold Utegg been very close buddies? A. I have known Harold Utegg since 1966.

Q. And isn't it a fact that you work with him not only on jobs but in union activities together? A. Please specify what you're talking about. I don't understand.

We belong to the same union, yes.

Brian DuBois, for Defendant Maggiolo, Cross

Q. And don't you work with him in the same union?

Mr. Sergi: What kind of work, your Honor?

Objection to the form.

The Court: Do you understand the question?

The Witness: I don't understand.

The Court: The witness says he doesn't understand the question, Mr. Edelman.

Mr. Edelman: All right.

Q. Do you remember—isn't it a fact that you testified—

Mr. Sergi: Where?

Q. —that you—the union usually keeps you (2053) pretty close together, you and Harold?

Mr. Sergi: May I have what you are reading from, please? I'm not reading from anything.

Mr. Sergi: He's looking at something and it would appear that he's reading from something.

If he is and I have a copy of it, I'd like to follow it, your Honor.

The Court: Don't give the appearance that you are reading from a document if you're not, Mr. Edelman.

Mr. Edelman: All right.

The Court: That's improper.

Mr. Edelman: All right.

(2054) *Cross Examination by Mr. Edelman: (Cont'd.)*

Q. Isn't it a fact that Page 11, the following questions were asked, Line 17, "Before that were you having any communication with Harold Utegg or David Utegg regarding that accident?"

Harold Utegg, for Defendant Maggiolo, Direct

"Answer: Well, Harold and I had pretty much worked together. If it's at all possible, the union usually keeps us pretty close together."

Is that a true statement? A. That's a fact.

Q. All right. Now to come back to the day of this occurrence, when you were at the—having lunch, you said a Mr. Slater came to see you? A. He did.

Q. And didn't Mr. Slater tell you that an accident happened with—to Bob Elliott, just yes or no? A. No.

Q. Is it your testimony that Mr. Slater told you that Bob Elliott was hurt in a fight? A. Mr. Edelman, he did not say any name. In my testimony I said a—an employee of the Village of Woodridge, that is all I said and that is all I know.

Q. Did Mr. Slater ask you whether or not you had

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(2080) HAROLD UTEGG, called as a witness, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

Direct Examination by Mr. Sergi:

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(2082) sand, the gravel, foundation over to the area of the laundry that day? A. Oh, around 1:30. A quarter to 2:00.

Q. Pardon? A. 1:30, a quarter of 2:00.

Q. Now, at any time that day were you down Glenwild Road going to the village dump? A. No, sir.

Q. Didn't go down there at all? A. That's right.

Q. Was there any demolition done that afternoon at all? A. In the afternoon, yes.

Q. What time in the afternoon was there demolition?

A. Maybe a quarter after 3:00.

Harold Utegg, for Defendant Maggiolo, Direct

Q. Now, when they—when the building was being demolished, did you take any of this stuff down Glenwild Road in the afternoon around 3:00 o'clock? A. Yes, sir, took one load.

Q. One load. Is that the only load? A. That's right.

Q. Now, did you see your brother David Utegg that afternoon? A. Yes, sir.

(2083) Q. And did you see whether he took any loads of debris down Glenwild Road that afternoon? A. He took one load also.

Q. One load.

Did you see your brother David during the day between 8:00 o'clock in the morning until 2:00 in the afternoon?

Did you see your brother David around driving his truck? A. Yes, sir.

Q. What kind of work did you see your brother doing from 8:00 o'clock in the morning until about 2:00 in the afternoon? A. Same thing I was doing.

Q. Same thing you were doing? A. Yes, sir.

Q. Now, when was the first time that anyone spoke to you about this accident after April 24, '72? A. Pardon?

Q. When for the first time did anyone ask you about what happened on April 24, '72? Anybody ask you about this accident? A. Oh.

Q. Just take it easy. Answer the questions the

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(2093) DuBois? A. Yes, sir.

Q. Will you tell us what that conversation was? A. He asked him if he was down that road, Glenwild Road, that morning. He said, no. In fact, he asked all three of us if we was down that road. He said no.

Q. When you say all three of us— A. That was Brian DuBois, myself and my brother.

Harold Utegg, for Defendant Maggiolo, Cross

Q. And you say you heard Brian say no, he was not down Glenwild Road that day? A. That is right.

Q. And you answered no, you were not down Glenwild Road that day? A. Yes, sir.

Q. And did you hear what your brother Dave said to that question? A. He said—

Q. What did your brother Dave say to that question? A. He said the same thing. We wasn't down the road that morning.

Q. That he was not down that road that morning? A. Yes, sir.

Q. Go ahead. What else did you overhear? A. And he says—he asked how come he wasn't down

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(2102) *Cross Examination by Mr. Edelman:*

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(2110) A. Yes, sir.

Q. When did you go to the Patio Motel? A. October 6th.

Q. Of what year? A. '74.

Q. How do you remember that date, that it's October 6th, how are you so precise? A. I got a subpoena.

Q. May I see the subpoena? A. Yes.

Mr. Sergi: May we have it marked for identification, your Honor.

The Court: Let it be marked.

The Clerk: So marked as Plaintiff's Exhibit 43 for identification.

(So marked.)

By Mr. Edelman:

Q. Am I correct then that you're sure that you were at this Patio Motel on October 6, 1974, about two months ago or so, is that correct, sir? A. Right.

Q. No doubt about that in your mind, is there? A. No doubt about it at all.

Harold Utogg, for Defendant Maggiolo, Cross

Q. Now, when you went to the Patio Motel, how (2111) were you called to the Patio Motel? A. How was I called there?

Q. Yes. A. They called me by phone.

Q. Who called you? A. Mr. Hulmes.

Q. And did he tell you why you had to go to the Patio Motel? A. Why?

Q. Yes. A. On Mr. Elliott's case here.

Q. Did he tell you that there was going to be some sort of a proceeding or a hearing at the motel? A. He said probably a hearing.

Q. A hearing? A. Yes.

Q. Did you understand that to be some sort of a legal hearing? A. I don't know if it was legal or not, but—

Q. Did he tell you that you had to be there? A. He would like to have me there.

Q. Did he tell you at that time that there is going to be any reporters there, someone to take any testimony down? (2112) A. No, sir.

Q. Did he tell you that at that particular time there is going to be a meeting of five or six or seven of the men who worked on the job for Maggiolo at that time? A. No, sir.

Q. In any event, at that time did he tell you what time to be at this particular motel? A. 12:00 o'clock.

Q. And did he also tell you at that time that you're going to be paid for your time or testimony? A. He said he'd take care of it, any expenses, yes.

Q. And when you went there, you knew you were going to get some money for coming down, is that correct? A. Yeah, but I didn't receive anything. Until I got subpoenaed.

Q. On that day in the Patio Motel, isn't it a fact that you got \$50? A. Yes, sir.

Q. And at that time were certain—was there certain questions and answers asked of you? A. Yes.

Q. All right.

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Charles Bernstein, for Plaintiffs, Direct

(2140) CHARLES BERNSTEIN, called as a witness, first being duly sworn, testified as follows:

Rebuttal Examination by Mr. Edelman:

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(2144) The Court: Strike it out as not responsive.

Q. Did you speak to anyone connected with the Maggiolo Corporation regarding this accident on April 24, 1972? A. Yes, I did.

Q. Who did you speak to? A. He was the foreman, the super, Joey Dee.

Q. Did you speak to Joey Dee on many occasions before that time? A. On several prior to that.

Q. And was that in connection with your official duties? A. Yes, that was.

Q. Now, that morning before you heard of the accident did you visit any of the demolition sites? A. I passed the site where demolition was going on.

Q. Where was that? A. Highland Avenue.

Q. What was being torn down at that time on the day of this occurrence? A. Heckman's Hardware.

Q. And where was that located? A. On Highland.

Q. And Highland near what other street? A. Well, it was connected with Main and Highland.

(2145) Q. About how long was— A. It was in a corner, sort of like a triangle.

Q. Was that at the corner virtually of Highland Avenue and Broadway? A. Broadway swings into it, yes. It's sort of a triangular spot between the three roads.

Q. And about what time of day did you see this demolition work being done on Highland Avenue on April 24, 1972? A. It was sometime late morning. I don't know the exact hour.

Q. Well, could you tell us what the outside limit of the time was, was it before lunch or after lunch? A. It was before lunch.

Charles Bernstein, for Plaintiffs, Direct

Q. Before what time? A. I guess before noon.

Q. Okay. And at that time did you see what was being done? A. I saw the equipment there and I saw trucks, one or two were loaded. I don't remember exactly, but I do remember that there was at least one truck loaded.

Q. And I show you these pictures and ask you whether or not—I show you first Plaintiff's Exhibit 27 in evidence—rather, 27 for identification.

Is this a true and fair representation of the

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(2147) four weeks.

The Court: We want to know what happened on the 24th.

The Witness: On that day, that's what it appears to me to be the case of the load.

Q. I show you Plaintiff's Exhibit 39 in evidence and ask you whether that is also a fair representation of how the trucks were being loaded on that day before noon.
A. That is.

The Court: How many trucks did you see loaded yourself?

The Witness: There were trucks there, one I know was loaded. I don't recall if there were two trucks loaded or not.

Mr. Edelman: I offer the first one, Plaintiff's Exhibit 27 for identification into evidence.

Mr. Sergi: I object, your Honor.

The Court: Objection sustained.

Q. Is this picture, Plaintiff's 27 in evidence, a fair representation—

Mr. Sergi: It is not in evidence.

Mr. Edelman: I mean for identification—

The Court: The jury may be excused.

(Jury excused.)

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Colloquy

(2209) The Court: All right.

Mr. Edelman: At this time, your Honor, I offer in evidence a subpoena which I would like to first mark for identification.

The Clerk: So marked as Plaintiff's Exhibit 47 for identification.

(So marked.)

The Court: May I see it.

The jury may ^{be} excused.

(Jury excused.)

The Court: Show it to Mr. Sergi.

Mr. Sergi: I object.

The Court: What's the purpose of this?

Mr. Edelman: To show that the defendant Maggiolo in the EBT testified that he kept progress records which would indicate the work being done at the job at the particular date and the place; that also the witness Diaco similarly testified from the record and therefore, your Honor, you ought to show that we also made another attempt to get it through a subpoena and none of these records were produced.

Your Honor, I respectfully submit that under those circumstances we would be entitled to a charge (2210) as to possible inference or an inference that could be drawn adversely to defendant for failure to produce books that they kept in the regular course of their business.

The Court: You mean offering a subpoena into evidence proves that they refused to bring in records that they had?

Mr. Edelman: That's the way I look at it.

The Court: The subpoena proves that? Where's the record?

Mr. Edelman: Subpoena plus what was read to the jury in the examination of Maggiolo, and also what Mr. Diaco stated on his direct examination.

He said they were in existence.

Mr. Sergi: He never said that.

Colloquy

The Court: Not only that, Mr. Diaco, as I recall it, said these are the only records that he knows of.

Is Mr. Maggiolo in court?

Mr. Sergi: No. I never saw this before. I never knew of this, your Honor.

The Court: Why didn't you give Mr. Maggiolo an opportunity to appear and explain to you that he has no records?

Of course, that you wouldn't like, right, (2211) Mr. Edelman?

Mr. Edelman: I would like it.

The Court: Why didn't you make the application before this time?

We will adjourn the case and give you the opportunity. Bring Mr. Maggiolo in tomorrow.

Mr. Sergi: May I be heard, please?

I want Mr. Edelman to point out to this Court where in Mr. Maggiolo's testimony during the deposition he said he had more records than Mr. Diaco said he had.

The Court: Mr. Sergi, I think I recall the testimony. I agree with you.

If this is another grandstand play then let Mr. Edelman have it.

He can bring him in tomorrow. Where's Mr. Maggiolo?

Mr. Sergi: I have no idea where he is. I don't even know where this was served.

It seems it was served by an Orangetown Police Department.

The Court: When was it served?

Mr. Sergi: It was served on December 5 asking that they be here on December 9th.

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(2282) Mr. Fetell: All right. Then I want to get it clear.

Colloquy

The Court: All right. Now, my rulings are in no way intended to limit Mr. Edelman to the language used in the testimony. We talked about fair comment.

Mr. Fetell: Yes sir.

The Court: Now look—

Mr. Fetell: We know what the—we know what the track record of fair comment in this case is, and it's been a problem to us.

The Court: You have to have a sense of the case and you have to be fair about it. There is some amount of flexibility that must be given to counsel. I dare say that Mr. Sergi—we haven't turned to him yet because he doesn't have that kind of a track record.

Mr. Fetell: That's right.

The Court: If I were to base it on this case alone, I might say everything I said to Mr. Edelman I should be saying to Mr. Sergi. It so happens that in my experience with Mr. Sergi it hasn't been as bad with Mr. Edelman. So I am not talking about—

Mr. Fetell: If Mr. Sergi didn't try this case—otherwise he would be guilty of malpractice.

The Court: That's what we call water over the (2283) dam. Don't for one moment think that I believe that Mr. Sergi is going to be the man with the white hat and that Mr. Edelman is going to be the villain here. I'm going to watch them both.

Mr. Fetell: I have no quarrel with that.

The Court: All right.

Mr. Orseck: Even if they use some Brooklynese expression such as "flying"—

The Court: The Brooklynese discussion, I discounted. I will allow him—I know he can't help that. It's how he uses it and the purpose he uses it.

Mr. Fetell: All right. Now, the defendant Maggiolo requests.

The Court: All right. Anything wrong with 1, 2, 3 or 4?

Colloquy

Mr. Edelman: No, your Honor.

The Court: All right. Any others? I found no fault with any of the others. I want to know if you find fault.

Mr. Edelman: Yes. In reference to 5.

The Court: Yes.

Mr. Edelman: In reference to the second portion of David Utegg. The factual basis—to unduly emphasize any testimony or throw doubt upon the

* * *

(2351) a great advantage and that's a great big factor, you know. I can see Mr. Elliott and Mr. Elliott's wife, Mrs. Elliott and I can see his lovely children that he was blessed with and I can see his mother-in-law and the father-in-law here in the courtroom.

I can see all that. And you know that they were—the children were brought here one day and taken away. And now they are brought here again today because this is the day that he's going to sum up and this is the day he's going to make reference to them.

So in your heart how can you be so—without compassion, without sympathy and turn them away? How could you do that?

Well, I tell you, I have sympathy for the kids, too. And I have compassion and I can feel like you feel. We are all human. But he's putting a demand on you that's unfair. Because your responsibility is a very, very heavy one, a very difficult one. You have to make a decision as to whether you turn this man away with the injuries that he got and now he places another burden on you.

Look at the poor children. You are going to hear it. Well, I'm going to tell you now because you see, I'm not going to have a chance to come back after (2352) he has said anything. I can't come back and say to you, well, of course he's going to argue it. When I sit down, that's the end of it. That's our judicial system. It's fair.

You got to stop someplace. Somebody has to go first.

Colloquy

Somebody has to go second. But I ask you if Mr. Edelman makes any comments that I have not referred to, you know what I would comment on it, you know I would respond and you respond for me. Because you will understand what the answer should be to whatever claim he's going to make.

Now, let me talk to you about another—and again I hesitate to say character because that's not what I mean to say, character. But another factor in all this.

Of course, it's like a production. With—it all comes together as it's being presented to you and we just can't overlook it because this—this part here becomes a very intimate—intimate part of the whole production. And it goes like this:

Mr. Elliott is in the hospital and he tells this story to Mrs. Elliott and he tells his story to his father-in-law.

Well, now, his father-in-law knows Mr. Orseck

. . .

(2394) regard for the human beings in and around the village of Woodridge.

Well, that was his opening, and you'll find that as far as the merits of the case, that the—their defenses, they first start off with one defense and then the shifting sand and another defense and another defense and another defense. And now in summation, it's a third defense. It's the last defense.

. . .

(2430) struggling to stay alive, he is certainly not at this time—you ever figure this Machiavellian thought, that he at that time got together with Joe Schacht, this 80-year-old man and cooked up a phoney case? Incredible. The man is fighting for his life.

What happens? Then he goes to Dr.—the man that gets him in the emergency room, Dr. Bessen, and this went into evidence. Dr. Bessen at that particular time—

Colloquy

this is within about, I think, 1:00 o'clock—by the way, if you go ahead and take it back, at that time if he was—it would take at least a half-hour to go this twenty-odd miles or twenty miles from Woodridge to Liberty with a man in the car and you have to go slowly; it's going to take a little more than a half-hour. He was in Dr. Costantino's office more than a half-hour. So it has to bring him before 12:00 o'clock. Let's take a look at this. Dr. Bessen in his original records states as follows:

"This 29-year-old male was injured on April 24. While at work a passing truck loaded with debris had a board fall off striking patient on the left side of his face."

(2431) Number three, if you remember, Mr. Elliott stated to you that when he got into the hospital itself, the Community General Hospital in Liberty, they asked him what occurred, and he told them exactly what had occurred.

By the way, he told them that a passing truck, a board fell off and hit him in the face, and they told them and they wrote it down. Certainly at that time it is incredible that he would not be telling the truth, if you are looking for where the truth is.

Did they ever confront him with anything that indicated one single deviation from the simple truth, as this man told it from the day of the happening of this occurrence?

Then the next thing is, he is taken from there to the Vassar Brothers Hospital in Poughkeepsie, and if you remember, and at that time it was virtually emergency operations, so later the same day, long before any lawyer is even in the case—and you remember at that time he also stated, they asked him the history, and he gave them the history exactly as he said it, and—

Mr. Sergi: Excuse me, your Honor, that was not included in the Exhibit, it was excluded by your Honor, and he is now commenting on the—

Colloquy

The Court: May I have that statement?
(2432) (Record read.)

Mr. Edelman: This is Mr. Elliott's testimony. They wrote it down. That's all, nothing more than that. You remember—

The Court: What do you say about it, Mr. Sergi?

Mr. Sergi: He is referring to a—

The Court: Is there any application?

Mr. Sergi: I object, your Honor, to his comments on evidence which—on history which is not in evidence. He is referring to it and saying that it confirms the plaintiff's position.

He doesn't have to read it.

The Court: I have excluded any history in any hospital report. That is as a matter of law. Don't consider it.

Mr. Edelman's repetition of the history does in no way add to the credibility of Mr. Elliott's testimony that he gave before you on the witness stand. You understand that. It was only admitted for one purpose, to show the treatment, and to the extent that the history was necessary for the treatment, it was admitted, and for no other reason.

So the repetition by Mr. Edelman of all the histories before the doctor, and the implication that he (2433) might have given it elsewhere, adds nothing whatsoever to Mr. Elliott's testimony.

Now go ahead, Mr. Edelman.

Mr. Edelman: All right.

Remember also Dr. Ganin got on the stand, and they asked him about his records, and Dr. Ganin—By the way, this is in evidence, and I am strictly sticking to the record, your Honor.

Mr. Robert Elliott, he says, patient, detailed story of accident, "While on highway was struck by plank." And originally was, "from highway." It was changed from

Colloquy

"highway" to "from truck" with the same pen, as you see, as the entire examination.

And then later on, apparently, he went ahead and added in another pen, "which fell from truck."

Mr. Sergi asked him where he got this story, where it fell from the truck, and he said he got it from the Vassar Brothers Hospital record.

Mr. Sergi: Your Honor, I must object strenuously. Why does he refer to something your Honor told him not to refer to?

The Court: The jury may be excused.

(Jury excused.)

The Court: What do you want me to do, Mr. Sergi?

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(2435) the various histories given by Mr. Elliott in order to show how the accident happened. I repeat that there is only one reason that the history that Mr. Elliott gave to the doctors was permitted, and that is because the doctors required it for treatment. You had a right to know what Mr. Elliott told. Any other use that Mr. Edelman makes out of it is improper.

I have cautioned him a few times about it. I keep reminding you so that you may not be confused by Mr. Edelman's recital of the number of times that Mr. Elliott gave histories to various doctors, and certainly references to the histories that were contained in hospital records is totally improper.

We run this trial according to fixed rules. Mr. Edelman knows it. He's been told about them, and any comments by him about what was in the hospital report, or any implication, or inference, that he asked you to draw about what was in the hospital report, is improper.

Go ahead, Mr. Edelman.

Mr. Edelman: Thank you, your Honor.

Colloquy

In connection with the original hospital record, the record of Community General Hospital regarding time, you will see that according to that portion of the history, it says, "11:30 A.M." Not 12:00 o'clock. This was made

* * *

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ROBERT and SHIRLEY ELLIOTT,

Plaintiffs,

against

MAGGIOLO CONTRACTING CORP., *et al.*,

Defendants.

72 C 1518

United States Courthouse
Brooklyn, New York
December 20, 1974
10:00 a.m.

Before:

Honorable Jacob Mishler, U.S.D.J.

* * *

(3) The Clerk: Civil Motion, Robert and Shirley Elliott against Maggiolo Contracting Corporation, *et al.*

The Court: Go ahead.

Mr. Edelman: Good morning.

Mr. Fetell: If it please the Court, on behalf of the defendant Maggiolo, we make application for a new trial under Rule 56B on the two grounds stated in the motion papers which were served.

Colloquy

I received Mr. Edelman's answering papers yesterday and I can only say that every time we get back to this case the defendants' position becomes reaffirmed.

This court has been denigrated; this court has been treated to what a Supreme Court Judge in the case, the name of which I can't recall, made reference to using the federal court as if it were a police court.

I don't take this position lightly, and I don't take it impetuously and I don't take it petulantly.

Mr. Edelman states in his answering papers that we have only set forth two alleged instances of misconduct. In the moving papers I raise two by way of example, with a statement that this trial (4) is still fresh in the mind of your Honor, and there is no point in preparing a catalog. It would have been pointless to go on for pages and pages and pages of examples.

This is the Federal Court. There are Federal Rules. Your Honor is a Federal Judge. Your Honor was the trial judge. Your Honor made his rulings.

* * *

(9) Let's get to the second aspect of it. The question of David Yutek, the manner in which his testimony went in is complicated, extremely complicated. It involves some possibly even novel questions of admissibility of evidence.

(10) Under normal circumstances, the Beniese(ph) deposition was taken, read at the trial, under proper proof of unavailability of witness. We had the benefit in this case of having appeared before your Honor on Friday before the trial and filed an affidavit, I'm not going to repeat it now, explaining the very complicated circumstances surrounding the use of Mr. Yutek's testimony.

It was our request, application, at that time for a continuance to afford us an opportunity to get Mr. Yutek into the courthouse directly, here in person, for reasons we set forth. Either he was going to recant in court or we

Colloquy

would be afforded an opportunity to subject him to cross-examination for the jury to consider, with your Honor making the rulings.

Your Honor made a ruling, and I don't want to appear offensive at this point, I'm not, but I most specifically urge that the rulings may not have been properly effective to accomplish the end desired because it may very well be that counsel understood—

The Court: I don't know that it's a ruling. I read that again. The charge of fraud was made. The representation of recantation was made—

(11) Mr. Fetell: Possible recantation.

The Court: Well, I thought it was definite recantation. I thought you had investigated—incidentally, wasn't it available—

Mr. Fetell: Home(ph) never saw him. It was not investigated, sir.

The Court: Whatever it is, I was under the impression that you had a witness that would testify that Mr. Yutek would say that he was bribed, he was paid, a fraud was committed, and he now wants to square things with his conscience or his God, I don't know which, but at any rate, it was at that point that I suggested that first Mr. Edelman promise, as he indicated he could, that Mr. Yutek would be here if he was physically able.

Then I suggested that you have this second deposition. I didn't say in order to establish a foundation, because I assumed that the lawyers knew how to introduce a statement that was inconsistent with his testimony. So I said, in effect, "Bring your investigator in after you have examined Mr. Yutek for the second time, and prove he's a liar."

So that you did and what Mr. Sergi did was—

Mr. Fetell: Or both of us.

The Court: Or both of you, you went on to (12) Scranton, examined Mr. Yutek a second time, and you

Colloquy

never asked him whether he made these statements to anybody else. You just asked him, again, to identify the statements he had made and he adhered to what his testimony was.

Now, mind you, all the arguments I have heard so far may possibly have had some legal significance except that you specifically waived all these claims.

I offered Mr. Sergi a mistrial.

Mr. Fetell: That's Mr. Edelman's "easy out."

The Court: No, it's not an easy out; it's the law. You cannot decide to waive error knowingly, willfully, waive an error in the trial and say, "Well, there was error and I want to appeal on that error."

Now, this wasn't more clearly done by you than when I said to Mr. Sergi, "Mr. Sergi, I will grant you a mistrial." I was telling him in advance that this was not just a *pro forma* motion. "Move for a mistrial, and I'll give it to you." And he said no.

Mr. Fetell: If it please the Court, might I address myself to that.

The Court: He may have to explain to his client as to why he said, "Well, I have been in (13) this trial three weeks and I don't want a mistrial."

Mr. Fetell: I would like to get back to Yutek.

The Court: I'm going to limit any further argument.

Mr. Fetell: I won't be much longer. Again, I'm cognizant of the calendar problems, but you say with all due respect, I personally don't feel that substantive matter should be swallowed up. I'm aware of it, your Honor.

The Court: It's only a week ago that the verdict came in and I remember this case almost as if it were being heard now.

Mr. Fetell: I know that.

The Court: I read your affidavit and I read Mr. Edelman's answering affidavit, and he's not arguing the

Colloquy

emotional issue at this point. He's saying in effect, "Assuming that prejudicial error was made, you waived it."

Mr. Fetell: Might I answer that.

The Court: One more thing he didn't say in his affidavit. Do you know that the very testimony that you say I excluded was admitted? It wasn't admitted on the basis of my ruling, but Mr. Edelman didn't object to it. Mr. Sergi asked Harold (14) Yutek as to whether he heard his brother David say that he was never down the road. You don't remember that?

Mr. Fetell: Yes, your Honor, I would like to address myself to the mistrial point for a moment. I'm not going to take that much of the Court's time.

The Court: Incidentally, I feel I'm perfectly sound on my rulings. I rejected. I have a proposed opinion already drawn. There was nothing new I expected in the argument.

Mr. Fetell: You know I'm not patronizing when I say we have respect for this Court. This argument is an honest disagreement.

But let me say this on the mistrial. I don't read the rules as requiring counsel to tell the Court it wants a mistrial. If the Court believes there is ground for it, the mistrial can be granted from the bench notwithstanding what counsel wants.

The Court: Really?

Mr. Fetell: I honestly believe—

The Court: In a criminal trial it's reversible error. After all—

Mr. Fetell: After all, there's a double (15) jeopardy.

The Court: Why should I give him a mistrial if you think you can win?

Mr. Fetell: That's not the point I'm raising. I want to stay to the technical aspect.

The Court: That's the answer to it.

Colloquy

Mr. Fetell: I'm in a very delicate—

The Court: What you're saying is "I don't want a mistrial. I want to see what the verdict is." You see?

Mr. Fetell: No, what I'm saying is this: Had we said we wanted a mistrial and backed off, if the Court felt it was ground for a mistrial *sui sponte*, I think your Honor had that power.

The Court: I don't know about that.

Mr. Fetell: I'm convinced.

The Court: If I have the power, I will not exercise it. If one party felt that they're winning, why should I give him a mistrial, if you think you're winning?

Mr. Fetell: That's not the point.

The Court: Let me say one more thing: Do you know that at one point Mr. Sergi moved for a mistrial?

Mr. Fetell: Four times.

(16) The Court: I denied it. Then at the end of the case, mind you, at the point where he could look back and have a good look at it, I said. "Mr. Sergi, if you want a mistrial, you can have it."

He said, "I don't want it."

Mr. Fetell: Your Honor, we made application for a mistrial at a point in the trial when we thought the conduct called for it. It may have been our wisdom that that particular item may not—

The Court: Mr. Fetell, I'm experienced enough to know that some motions are made for the record when you know it's not going to be granted.

Mr. Fetell: You're arguing tactics. I'm arguing law.

The Court: Preserving the record is the job of every lawyer. I sense when a lawyer just moves for a mistrial for the record.

Mr. Fetell: We were dead serious.

The Court: Then why didn't you take advantage of it at the point where it would do you the most good, at the end of the case?

Colloquy

Mr. Fetell: That became a legal judgment.

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(19) The Court: How do you get out of the statement that this Court intends to make in its draft—proposed opinion: "Further, the Court offered Maggiolo a continuance for the purpose of conducting a third deposition of David Yutek in order to establish a proper foundation for the admission of prior statements. Transcript of page 2293.

The Court also notes that Harold Yutek did (20) testify that David Yutek told plaintiffs' counsel in Harold's presence that he did not drive the truck down Glenwild Road on the morning of April 24th, 1972, transcript at 2093.

Mr. Fetell: I understand. I'll answer your question directly. The Court takes the position there must be confrontation. By giving us a continuation, it was going back for confrontation. If I'm wrong, maybe the Court of Appeals some day will tell me this or another case I'm wrong.

The Court: You distinguish a live witness from a deposition. I'm saying to you that I gave you every benefit that you have of your alive witness by saying to you, "If you're prejudiced, if you misunderstood my ruling or my suggestion"—it wasn't a ruling—"on the Friday before the case came to trial, then here, I'll continue the case. Go up and ask Mr. David Yutek, 'Did you ever tell your brother that you lied in the courthouse? Did you ever tell him you lied?' if he said 'No,' then you could ask Harold that question, and if he said 'Yes' you would have it before the jury."

But the very point of all the rulings or principles is to give that witness the opportunity to explain.

(21) Mr. Fetell: Why? Why? I know of no rule of law and I have been doing reading myself. Yes, con-

Colloquy

frontation with prior inconsistent statements is a possibility.

The Court: Mr. Fetell, on Friday morning I usually don't permit argument. I go through the whole calendar and then I ask the lawyers who are on civil cases to wait until I get through with all my criminal matters.

Mr. Fetell: I didn't ask to be called early. The case was called.

The Court: Would you like to continue this argument?

Mr. Fetell: One sentence and then stop.

The Court: One sentence.

Mr. Fetell: I disagree as a matter of law that in order to prove a witness lied it is necessary as a condition precedent to have confronted that witness with your claim of lie. I specifically submit the proof of lying can go before the jury as proof of a question of fact. I don't think a witness is entitled to prior confrontation as a matter of law. That is where we have a very serious disagreement on that question, in a respectful disagreement.

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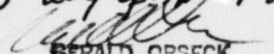
State of New York
COUNTY OF SULLIVAN

CHRISTINE BUDD, being duly sworn,
deposes & states that on Apr. 13, 1975,
at the Post Office, LIBERTY, N.Y. she
mailed three copies of Appendix, Vol II,
To:

Sengi & Fetell Esqs
44 Court Street
Brooklyn NY 11201

Dominick J Cornella Esq.
160 Broadway
New York, N.Y. 10038

Sworn to before me this
13th day of April, 1975


GERALD ORSECK
Notary Public, State of New York
No. 762
Sullivan County
Term Expires March 30, 1976

Christine Budd